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In The

Supreme Court of the United States

October Term, 1970

No. 751

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,

Petitioner.

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September, 1970

THE CADILLAC PRESS, INC. – 1717 K Street, N. W. – Washington, D. C. 20006

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MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 30, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. It is printed as Appendix A to this petition. The opinion,

findings of fact and conclusions of law of the United States District Court for the District of Columbia are reported at 302 F.Supp. 459 and are reprinted as Appendix B to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 30, 1970. A copy is appended as Appendix C hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a combination in restraint of a competitor's trade is outside the scope of the Sherman Act merely because there is no commercial intent or purpose in the action that produces the restraint?

2. Whether a private association exercising governmental powers and hence subject to the inhibitions of the Constitution, including the requirement that it accord due process and the equal protection of the laws, should have its actions judged by a more lenient standard than the standard which would be applicable to the government itself.

3. Whether an educational accrediting association, which exercises governmental power and is thus subject to constitutional restraints, must show a compelling need to justify under the Constitution its policy of refusing to consider proprietary educational institutions for accreditation and thereby discriminating against them on the sole ground that they are proprietary, without regard to their quality as educational institutions.

4. Whether, in an antitrust and constitutional context, it is reasonable for an educational accrediting

association, whose stated purpose is to identify institutions which have achieved quality in terms of their own aims and programs, to refuse to consider an institution for accreditation solely because it is organized for profit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be * * * deprived of life, liberty or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3 of the Sherman Antitrust Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. §3, provides in pertinent part:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia, . . . is declared illegal."

Other statutory provisions involved are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

Petitioner Marjorie Webster Junior College, Inc. ("Webster") operates a junior college for women in the District of Columbia. Founded as a partnership in 1920, the school was incorporated in the District of Columbia in 1927 as a corporation for profit for educational purposes. Since 1947, it has been accredited as a junior college by the Board of Education of the District of Columbia and licensed by the District of Columbia to confer the degree of Associate in Arts. (P-X-39, P-X-43).[1]

Respondent Middle States Association of Colleges and Secondary Schools, Inc. ("Middle States") is a non-profit membership corporation. Its membership consists primarily of institutions of higher and secondary education in the Middle States region of the United States.[2] Its announced function and purpose is to serve the educational world and the public by establishing standards of quality and identifying those institutions which achieve them through a process known as

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[1]Rule 21 of this Court provides that filing of the record in the court below is not a requisite for docketing a petition for certiorari. Since the record of this case if very voluminous, petitioner has not requested that the clerk of the court below certify the record to this Court. Consequently, the documents in the record are not numbered at present except as they were numbered by the trial court. Factual statements in this petition will be supported by references to the record below as contained in the Joint Appendix (J.A.), the exhibits as numbered at trial (P-X or D-X) and the transcript of testimony (Tr.). To avoid needless references, no citations to the record will be made to support undisputed facts.

[2]This region consists of Delaware, Maryland, New Jersey, New York, Pennsylvania, the District of Columbia, Puerto Rico and the Canal Zone.

"accreditation." (P-X-4C). Accreditation is concomitant with membership.

Colleges and universities in the United States vary widely in the quality of their programs. Therefore, a means of evaluating higher educational programs and identifying those of acceptable quality is a necessity. The process of accreditation has grown up to meet this need. Accreditation is vital to any institution of higher education. It is particularly important to a two-year college which must transfer its graduating students to four-year colleges and universities. The only way in which Webster can obtain certification of the quality of its junior college which will be widely recognized is through accreditation by Middle States.[3] (P-X-39, pp. 1-5, 129-131, J.A. 350-351, 380).

Seeking recognition of the quality of its institution, Webster applied to Middle States for membership and accreditation in May, 1966. Its application was rejected without any inquiry into the quality of its educational program solely because Webster is incorporated as a corporation for profit and Middle States requires an institution to be organized on a nonprofit basis in order to be eligible for membership and accreditation.

After Middle States refused to examine Webster's educational program, Webster filed suit in the United States District Court for the District of Columbia seeking an injunction to require Middle States to accept its application and evaluate its junior college. This action was brought under the antitrust laws, the Constitution of the United States, and the common law controlling the activities of private associations. After ten weeks of trial, the trial court issued its opinion, findings of fact and conclusions of law (App. B, 302 F.Supp. 459), holding

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[3]Middle States is one of six regional accrediting associations covering the United States, all of which have banded together to form a nationwide Federation of Regional Accrediting Commissions of Higher Education.

for Webster on all counts. Middle States appealed. The Court of Appeals reversed, holding that:

1. The Sherman Act is not applicable to Middle States' conduct because Middle States' restraint of Webster's trade was not commercially motivated.

2. Judicial interference with Middle States' accreditation policies is not warranted because Middle States has no monopoly power over the operation of educational institutions and exclusion of Webster will not prevent successful operation of the junior college.

3. Assuming that Middle States' action is state action subject to the limitations of the Fifth Amendment, Webster failed to carry its burden of proof that discrimination against proprietary schools lacks a reasonable basis.

The foregoing is a brief statement of the case. Additional details are required for a full understanding of the issues and the reasons why the requested writ should be granted. These details concern (a) the record evidence demonstrating that the exclusion of a school solely because it is proprietary is unreasonable; (b) Middle States' monopoly of the vital power of regional accreditation; (c) the injury caused to Webster by the proprietary exclusion; and (d) evidence demonstrating that Middle States' action is state action subject to the Constitution.

(a) *Reasonableness of the proprietary exclusion.* Middle States' basic function as an accrediting association is to serve the educational world and the public by establishing standards of quality and identifying those institutions which achieve them. In this process, Middle States seeks to determine in qualitative terms whether an institution has clearly defined and appropriate objectives, whether it has established conditions under which it can reasonably be expected to attain them and whether it appears to be attaining them and to be able to continue

to do so. The process involves self-evaluation by the institution, evaluation by a visiting team drawn from Middle States' membership, and action upon the report of that team by the constituent Commission on Institutions of Higher Education. (P-X-4C).

On the face of Middle States' accreditation functions and its means of performing them there is no reason to exclude proprietary institutions from consideration for accreditation. And the evidence at trial supplied no reason found valid by the judge who heard the testimony.

A recent study by the United States Office of Education ("USOE") indicates that there is no empirical data or research to support the proprietary exclusion. (J.A. 385-388). The Western Association of Schools and Colleges, a regional accrediting association with standards of accreditation very similar to Middle States, continues to accredit three proprietary colleges. (P-X-40, pp. 7, 17, P-X-78, P-X-79, J.A. 128-135, 488-491). Although Middle States listed an officer of that association as a witness in this case, he was not called to render any factual testimony concerning adverse experience with proprietary institutions. Middle States itself has evaluated and accredited three proprietary secondary schools in New York City, applying accreditation standards comparable to those used for colleges and universities. (J.A. 472, Cresswell Dep. 22-23, 62, 78). In its vigorous defense of this case, Middle States presented no evidence from its own experience with these three schools to demonstrate a conflict between the profit motive and the goals of education.

Webster has been licensed and accredited by the District of Columbia government under standards fixed by Congress for junior colleges in the District.[4] Three regionally accredited universities, having had actual

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[4] 29 D.C. Code 415 and 31 D.C. Code 120 (1967 ed.).

experience with Webster graduates, have furnished USOE with letters stating that they accept transfer students from Webster as if they came from regionally accredited institutions. (P-X-52, p. 1, J.A. 188-189). Congress has recognized the importance of proprietary higher education in the Higher Education Amendments of 1968, making federal aid available to students who attend "proprietary institutions of higher education." (App. D). The Accrediting Commission for Business Schools and the Engineering Council for Professional Development (both recognized by USOE as "nationally recognized accrediting agencies") accredit proprietary institutions of higher education. (J.A. 381). The Joint Commission on Accreditation of Hospitals, dealing with institutions vital to the nation's health, accredits numerous proprietary hospitals. (P-X-151).

At the trial, both parties called expert witnesses to testify about the reasonableness of the proprietary exclusion. Webster's experts covered a broad spectrum of experience and philosophy. Five were current or past college presidents. Two had served on higher commissions of regional accrediting associations. One was the current executive director of the National Commission on Accrediting, who also serves as Chairman of the USOE Advisory Committee on Accreditation and Institutional Eligibility. They ranged in philosophy from Dr. Milton Friedman of the University of Chicago, a leading conservative economist, on the one hand, to Christopher Jencks, past education editor for the New Republic and co-author of "The Academic Revolution," on the other hand. Coming from both public and private institutions, they rendered their opinions with no apparent reason for bias. In fact, Dr. Lloyd Elliott, President of The George Washington University, acknowledged on cross examination that his testimony might expose him and his institution, as a member of Middle States, to civil and criminal penalties under the antitrust laws. (Tr. 602).

In brief, the opposing experts testified as follows:

Middle States–the profit motive is at odds with the educational process as it diverts to taxes and profit resources which would otherwise be utilized for the program. For an institution to reach its educational potential, it must devote its total financial resources to the program. Proprietary institutions inherently lack institutional integrity since decisions will be colored by the profit motive in a manner too elusive to be identified in the evaluation process. (P-X-10, P-X-104).

Webster–the best way to determine the quality of an institution is to evaluate its quality without regard to its form of organization. Refusal even to consider the merits of proprietaries is a failure of the basic purpose of regional accreditation to identify all institutions of quality and is contrary to one of the stated purposes of accreditation, that of stimulating institutions to reach their maximum effectiveness, since proprietaries are denied this stmulation. Since the form of an organization is not as important as its function, all institutions, regardless of form, should be evaluated to determine whether they are functioning at the required level of excellence. (J.A. 8-9, 28-29, 48, 103, 352, 429-430). The important consideration is not whether *total* resources are devoted to the program, but whether the resources used are *adequate* for a quality program. (J.A. 14, 335, 432). An evaluation team can determine if decisions are being made in a appropriate fashion regardless of the corporate form of the institution. The effect of the profit motive in the decision making process is no more elusive than pressures felt by public and private non-profit colleges controlled by states or religious bodies. (J.A. 21-22, 26-28, 54-56, 60-61, 80, 89, 114, 117, 153, 157, 159, 230, 338-339, 364).

In addition, many of Webster's experts expressed the opinion that the major threats to higher education at this time are bureaucracy, inefficiency, and monolithic

state control.[5] The best guarantee against these threats is a wide diversity of competing institutions available for public selection. (J.A. 79, 333, 209). There is no inherent virtue in a nonprofit system. In fact, the profit motive makes the interest of the proprietor coincide with the interest of the student and society—to provide quality education at a fair price. The profit motive is a compelling force toward efficiency, which ensures effective use of resources. (J.A. 209-17, 79, 107-08, 146). Above all, with unprecedented demands upon educational resources in the country at this time, no form of institution should be excluded from accreditation without even being evaluated. New sources for development of institutions should be encouraged—not discouraged. (J.A. 52, 78, 208).

(b) *Middle States monopoly of regional accreditation*. Middle States is the only accrediting association which undertakes general accreditation of liberal arts based institutions of higher education in the Middle States area, which includes the District of Columbia (J.A. 380). The only manner in which Webster can obtain certification of the quality of its junior college which will be widely recognized by the public is through accreditation by Middle States. In 1964, Middle States combined with the five other regional associations to form the Federation of Regional Accrediting Commissions of Higher Education, which speaks for the six regional agencies on matters of common interest and seeks to establish common policies and procedures. As one of its first acts, the Federation adopted a statement

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[5] Predictions concerning the trend toward exclusive state control of higher education appear to be supported by recent developments. The August 31, 1970 issue of *The Chronicle of Higher Education* (Volume IV, Number 38) contains the following report:

> "The swing of college enrollments away from private institutions, a fact that the private sector began to view with alarm several years ago, has accelerated in 1970. There is talk now of an approaching 'public monopoly' in higher education."

of uniform criteria of eligibility for consideration for accreditation, including the requirement that an institution must be a nonprofit organization. (P-X-34).

(c) *Injury to Webster because of the proprietary exclusion*. The best available method of determining the general quality of a college or university is to see whether it is accredited. (P-X-52, p. 7). In widely distributed publications both Middle States and the Federation advise high school students and their guidance counselors that accreditation warrants public confidence in an institution's program. (P-X-5, P-X-7, P-X-40, J.A. 457). Widely used reference works repeat and republish the favorable significance of regional accreditation. (P-X-38, P-X-39, P-X-114, P-X-148). High school students are counseled to avoid unaccredited colleges. (J.A. 195, 198-200, 203-04, 325-27, 299-300). Because it lacks such accreditation, Webster receives an inferior designation in an annual publication of the American Association of Collegiate Registrars and Admissions Officers, widely used by college admissions officers in evaluating student transfer applications. (P-X-44, J.A. 249-53, 266-67).

Due to lack of regional accreditation, Webster graduates experience great difficulty in transferring credits to senior institutions. Their choice of senior institutions is severely limited. At most senior institutions, transfer of credit from unaccredited colleges is either impossible or is granted only on onerous conditions not imposed upon graduates of accredited schools. (P-X-47a-47mm, P-X-70-76, J.A. 307-09, 314-15, 317, 501-04, 517-19, 492-500, 536-41, 545-47, 555-60, 562-64, 573-75, 579-80).

In short, Webster is stigmatized as inferior by lack of regional accreditation. Furthermore, its students are denied the benefits of the federal programs for College Work-Study and National Defense Student Loans, extended to students of proprietary institutions of higher education by the Higher Education Amendments of

1968.[6] Students qualify only if the institution they attend is accredited by a "nationally recognized accrediting agency or association."[7] The only type of accreditation which qualifies a student at a proprietary liberal arts college for such programs is the institutional accreditation afforded by the six regional accrediting associations.[8]

Finally, the process of evaluation and accreditation is recognized to be a strong force for institutional development and improvement, elevating the quality of a school by a program of searching scrutiny and examination. (P-X-1, p. 2, J.A. 128-130, 136-38). Webster and its students are arbitrarily deprived of this benefit.

(d) *Middle States' activities as state action in a constitutional sense.*[9] Accreditation of colleges and universities is inherently a governmental function. Unlike most other countries, the United States has no ministry

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[6]P.L. 90-575, 82 Stat. 1014, sections 139 and 151. (App. D).

[7]Id, sec. 151, amending Title IV of Higher Education Act of 1965 by adding new section 461(b).

[8]P-X-139, p. 2, J.A. Vol. V; Testimony of USOE official, John Proffitt, J.A. 375-76, 380, 382-84. The Court of Appeals is in error in stating that "[a]ppellee's lack of accreditation does not appear to render * * * its students, ineligible to receive federal aid." (App. A-9). The Higher Education Amendments of 1968, for the first time, made students at proprietaries eligible for College Work-Study and National Defense Student Loans provided that the proprietary is accredited by a "nationally recognized accrediting agency or association." The so-called "three-letter certification," referred to in footnote 32 of the Court of Appeals opinion, does not qualify students at proprietary institutions for these benefits.

[9]The Court of Appeals assumed, without deciding, that the nature of Middle States' activities or their federal recognition renders them state action in a constitutional sense. Because of the importance of this question, a brief statement of record evidence concerning the governmental nature of these activities is considered appropriate.

of education or other centralized authority directly controlling educational institutions, although all states exercise varying degrees of regulation of institutions within their borders by the process of charters and licenses to award degrees and 75% of the states carry on some form of accreditation. However, the pattern and standards of state accreditation vary widely, so that it may mean much or little, depending upon the state. In the absence of a centralized ministry of education to establish educational standards, and in the absence of a reliable and uniform system of state accreditation, private associations have undertaken this inherently governmental function of establishing standards and identifying institutions which have achieved them. (P-X-39, pp. 1-5, 129-31, J.A. 350-51, 372-74, 380).

Both the Federal and State governments have utilized Middle States and the other regional accrediting associations as agencies to identify institutions worthy of benefits conferred by the government. The regional accrediting associations have operated as service agencies for federal and state governments, performing the delegated function of quality determination. This is particularly apparent in the relationship between the regional associations and the Federal Government.

The Federal Government spends vast sums on aid to higher education. Most of the statutes providing for such aid require that to be eligible an institution must be "accredited."[10] The regional accrediting associations are

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[10] These statutes generally provide as alternative grounds that eligibility may be established if three accredited institutions accept credits from an institution as if it were accredited or if an institution can give "satisfactory assurance" that it will meet standards of an accrediting agency within a reasonable period of time. Both of these alternatives rely upon the standards of the accrediting agency. (Note: These alternatives are not available to a proprietary to qualify its students for federal College-Work Study and National Defense Student Loan Programs. See footnote 8, *supra*.)

the only associations recognized by the U.S. Commissioner of Education as reliable authorities concerning the quality of training offered by total institutions of a non-specialized nature, such as Webster. The regional associations have recognized and admitted that they have operated "as service agencies for the USOE in helping to determine the eligibility for participation in federal aid programs for newly founded institutions." (P-X-37G, P-X-37G-1, P-X-123, J.A. 377-78, 380, 1509-18).

Middle States' function as an agency to identify institutions of quality is not limited to its relationship with the Federal Government. In every state within its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans, state scholarships or, in the case of the District of Columbia, admission of attorneys to the bar. (P-X-50, P-X-68, P-X-71A, Ann. Code Md., Art. 77, Sec. 100, 31[illegible](e), J.A. 1434-38).

Through the accreditation process, Middle States substantially controls the organization and curricula of its member institutions, including many financed and operated by the state and federal governments. Using a system of evaluation, reports and recommendations, backed up by threatened loss of accreditation, Middle States influences every aspect of the institutions it accredits, including the form of governance, the type of programs offered, curricula, appropriate faculty teaching load and admissions and graduations standards. (P-X-36A-36F, J.A. 639(1), 640-51).

Federal academies which educate officers of the United States Armed Forces have been directed to furnish reports of compliance with Middle States' recommendations concerning curriculum, faculty, library and control of these academies. (P-X-36F, p. 10, P-X-36A, p. 17). Public colleges have been threatened with loss of accreditation if state educational agencies do not take remedial action recommended by Middle States. State superintendents of higher education have been told by

Middle States that state planning and leadership is inadequate. (P-X-36D, pp. 7, 17, P-X-36E, p. 5, P-X-36F, pp. 15-16). Middle States has told the State of Pennsylvania which public and private institutions should be permitted to operate masters degree programs. (P-X-36A, pp. 5-6, 8-10). It is not difficult to understand why every institution has always adjusted its affairs to comply with Middle States' recommendations. Its coercive power is altogether like that of a government.

REASONS FOR GRANTING THE WRIT

A. Antitrust.

The vast and growing power of associations and foundations which operate without commercial motives but nevertheless have awesome capacity to restrain trade[11] requires resolution of the antitrust issue in this case by this Court. The Court of Appeals has clearly enunciated the doctrine that action of a combination in restraint of trade, whether reasonable or unreasonable, is

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[11] An indication of the growth and power of foundations is the increase in a three year period of total foundation assets from $14.4 billion to $19.9 billion. *The Foundation Directory*, Edition 3, Russell Sage Foundation, New York, 1967. "Students of politics and law have long recognized the public influence of private associations as well as their immense power over members of the association." *Exclusion from Private Associations*, 74 Yale L.J. 1313 (1965) "[G]reater control over private organizations may be made necessary by the considerable power such organizations possess..." As private associations grow larger and more bureaucratized, they are "able to inflict greater injury on private persons..." *Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983, 989 (1963). With respect to accrediting associations, "[t]he educational accrediting agency is a powerful instrumentality in the United States–able, with minimal governmental interference, to set policies and standards in an area of vital concern to the public." *The Legal Status of the Educational Accrediting Agency*, 52 Cornell L.Q. 104 (1966).

beyond the scope of the Sherman Act if that action is not commercially motivated.[12]

In so ruling the Court of Appeals has decided an important federal question in a manner that conflicts with this Court's decision in *American Medical Association v. United States*, 317 U.S. 519 (1943), and with decisions of other courts of appeals. The Court of Appeals misread the *AMA* case as sanctioning its unduly restrictive view of the reach of the antitrust laws. This Court should take the matter in hand at this time because the actions of organizations with non-commercial motives increasingly bear upon their members and non-members, giving rise to claims of restraint that, we submit, should properly be adjudicated pursuant to the antitrust laws.

The Court of Appeals recognized that in the ordinary case Middle States' actions would have constituted a restraint of Webster's trade under the Sherman Act. However, the court went on to state that, in its view, "the character of the defendant association and the nature of the activities which it regulates, require a finer analysis." (App. A-3-4). It then observed that the Sherman Act was a product of the era of trusts and combinations, aimed *primarily* at combinations having commercial objectives–a proposition which petitioner does not contest. At this point the court went astray. From the proposition that the Sherman Act was aimed

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[12]Although petitioner concedes for purposes of this petition that Middle States exclusion of Webster is made without commercial motives, it cannot be entirely conceded that Middle States activities are either noncommercial or purely motivated. The commercial aspects of institutions of higher education are treated in the trial court's opinion. (App. B-12). Activities of this nature have recently lead the NLRB to overrule past decisions and hold that colleges and universities are engaged in commerce. Cornell University, 74 LRRM 1269 (1970). As for purity of motivation, petitioner can only observe that Middle States has stated that a major reason for exclusion of proprietary schools is that independent, publicly responsible schools (its members) require protection from proprietary institutions. (P-X-10).

primarily at combinations with commercial objectives the court proceeded to a conclusion which does not logically follow—that the Act proscribes *only* actions with commercial objectives. It then held that "an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." (App. A-5-6).

In support of this doctrine, never before enunciated by any court, the Court of Appeals quoted (at Fn. 18) the following from *American Medical Association v. United States, supra* at 528-29 (1943):

> "As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the *purpose and effect* of their conspiracy was . . . obstruction and restraint of the business of Group Health . . . Whether the conspiracy was *aimed at* restraining or destroying competition, or had *as its purpose* a restraint of the free availability of medical or hospital services in the market, the *Apex* case places it within the scope of the statute." (Emphasis supplied by Court of Appeals.)

The court went on to hold that Middle States was not necessarily immune in all of its activities from regulation under the antitrust laws—that it was "possible to conceive of restrictions on eligibility for accreditation which could have little other than a commercial motive." Concluding its antitrust discussion, the court stated, "Absent such motives, however, the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself." (App. A-6).

Despite the reliance of the Court of Appeals on the *AMA* case, its error, we submit, lay in departing from the rule of that case. This Court there held clearly that, when the organization at which a restraint is directed is

in trade, the character of the restraining association is immaterial. It did so in language that it quoted from the opinion of the Court of Appeals in that case, the same court of appeals that rendered the decision below. This Court stated: "And, of course, the fact that defendants are physicians and medical organizations is of no significance, for Section 3 prohibits 'any person' from imposing the proscribed restraint."[13] Language could not be plainer.

The Court of Appeals for the District of Columbia had two occasions to rule upon the issues in the course of the AMA litigation–*United States v. American Medical Association*, 72 U.S. App. D.C. 12, 110 F.2d 703 (D.C. Cir., 1940) and *American Medical Association v. United States*, 76 U.S. App. D.C. 70, 130 F.2d 233 (D.C. Cir., 1942). In the second *AMA* case, the Court of Appeals ruled squarely that good motives could not excuse a violation of the Sherman Act (130 F.2d at 249):

> "Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman Act." (footnotes omitted)

Significantly, the Court of Appeals did not deal with this doctrine in discussing the instant case. Similarly, it did not deal with its own decision in *Levin v. Joint Commission on Accreditation of Hospitals*, 354 F.2d 515 (D.C. Cir., 1965). In that case, "the character of the defendant association and the nature of the

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[13] United States v. American Medical Association, 110 F.2d 703, 711 (D.C. Cir., 1940). This interior quotation was omitted from the circuit court's quotation of the Supreme Court's holding in the AMA case, *supra*.

activities which it regulates"[14] were identical to that of Middle States, except that it accredited hospitals rather than educational institutions. Relying upon the three *AMA* cases, the court rejected the defendant's contention that its "activities . . . were not of a *kind* to bring them within the antitrust laws," (354 F.2d at 518, emphasis in original).

This demonstrated confusion and inconsistency in one appellate circuit concerning the significance of an antitrust defendant's motive shows the need for clarification of this Court's holding in the *AMA* case.

Not only has the court below acted inconsistently with its own prior decisions, but its decision in this case is inconsistent with decisions of other courts of appeals.

In *Council of Defense of State of New Mexico, et al. v. International Magazine Co.*, 267 F.390 (8th Cir., 1920), a patriotic council banded together in the First World War to boycott distribution of Hearst publications in New Mexico, motivated solely by a patriotic desire to discourage dissemination of Hearst's antiwar views. Although the ultimate purpose[15] was clearly patriotic and non-commercial, the court held that the Sherman Act proscribed this boycott.

Other courts of appeals decisions make it clear that a non-commercial purpose confers no immunities from the Sherman Act.[16] "But purpose is never an excuse in these cases; only the intent of the accused, or the necessary result of his conduct, counts, . . ." *United States v.*

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[14]The quotation is from the circuit court's opinion in the instant case. (App. A-3-4).

[15]The court stated that the "purpose" was to destroy Hearst's business (267 F.390) but it is clear from the facts in the case that the "intent" was to destroy the business in order to accomplish a "purpose" which was purely patriotic. See discussion of "motive, intent and purpose," Coons, *Non Commercial Purpose as a Sherman Act Defense*, 56 NYU L. Rev. 705, 742 (1962).

[16]*Comment*, 44 NYU L. Rev. 1014, 1019 (1970).

Gold, 115 F.2d 236, 238 (2nd Cir., 1940). The "purposes of the confederates" will not justify an unlawful conspiracy. *Fashion Originators Guild of America v. Federal Trade Commission*, 114 F.2d 80, 84 (2nd Cir., 1940), *affd.* 312 U.S. 457 (1941). The "benevolent motives" of conspirators do not save them from criminal prosecution for violation of the Sherman Act. *United States v. General Motors Corporation*, 121 F.2d 376, 406 (7th Cir., 1941), *cert. denied* 314 U.S. 618.

These court of appeals decisions are solidly grounded upon Supreme Court precedents holding that specific intent to restrain trade is not requisite to violation of the antitrust laws, if a restraint of trade is the consequence of a defendant's conduct. *United States v. Griffith*, 334 U.S. 100, 105 (1948); *United States v. Patten*, 226 U.S. 525, 543 (1913). The prohibitions of the Sherman Act cannot be evaded by noncommercial purpose or motives. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912).

Finally, the need to clarify the rule of the *A* [illegible] case is more than doctrinal. It is of great importance to a developing body of litigation. In the context of this case alone disputes concerning the exercise of accrediting association power have led to significant litigation.[17]

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[17] North Dakota v. North Central Association of Colleges and Secondary Schools, 99 F.2d 697 (7th Cir., 1938); Parsons College, Inc. v North Central Association of Colleges and Secondary Schools, 271 F.Supp. 65 (N.D. Ill. 1967). In Parsons College, the court suggested that action under the antitrust laws might be appropriate under the principles of Silver v. New York Stock Exchange, 373 U.S. 341 (1963) but did not pass upon the question as it had not been raised.

Other suits have been brought[18] and extensive litigation may be anticipated in the future.[19] The antitrust laws have been suggested as appropriate vehicles to control the vast power of associations in general[20] and educational accrediting associations in particular.[21] The question of antitrust immunity of such associations will be troublesome and unsettling in cases of this nature unless resolved by this Court.

B. Constitutional

Having assumed, without deciding, that "the nature of [Middle States'] activities or the federal recognition which they are awarded renders them state action subject to the limitations of the Fifth Amendment," (App. A-14)[22] the Court of Appeals concluded that Webster

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[18] American Academy McAllister Institute of Funeral Service, Inc., et al. v. American Board of Funeral Service Education, Inc., Civil Action No. 1399-69, filed May 29, 1969, U.S. District Court for the District of Columbia (pending trial); U.S. School of Music, Inc., et al. v. National Home Study Council, et al., Civil Action No. 3541-69, filed December 13, 1969, U.S. District Court for the District of Columbia (settled and dismissed).

[19] "A prediction that the 1970s may become the decade of the courts and attorneys in accreditation was heard by 85 representatives of accrediting agencies, the U.S. Office of Education, and other education associations at a conference convened by the National Commission on Accrediting in Washington, D.C., on December 17, 1969. * * * There is a growing tendency for solutions to accrediting issues to be sought in the courts." *Reports*, pp. 1, 3, February, 1970, National Commission on Accrediting, Washington, D.C.

[20] *Judicial Control of Actions of Private Associations*, 76 Harv. L.Rev. 983, 1042 (1963).

[21] *The Legal Status of the Educational Accrediting Agency*, 52 Cornell L.Q. 104, 128 (1966).

[22] The Court of Appeals having made this assumption of state action, it is not necessary to discuss in detail the evidence supporting this conclusion. A summary of this evidence is set forth

(Footnote 22 continued on page 23.)

had failed to carry its burden of showing the unreasonableness of the restriction. In reaching this conclusion, the Court of Appeals did not engage in any traditional equal protection analysis. Its reasoning is found in that part of its opinion in which it considered whether, under the common law of the District of Columbia, the harm done to Webster by Middle States was actionable.[23] It held there that the Middle States' standard by which it excluded proprietary schools from consideration was not unreasonable. But there was no real inquiry into reasonableness. The court merely said that "substantial deference" was owing to Middle States' judgment principally because the record of the case did not support a conclusion that Webster would be unable to operate a junior college successfully without Middle States' accreditation. What it said precisely was:

Footnote 22 continued:
above (pp. 12-15). It seems adequate to observe, at this point that (1) the accreditation function is inherently governmental, (2) Middle States acts as a service agency for Federal and State governments to identify institutions eligible for Funding, and (3) Middle States accreditation process results in a degree of control over curriculum, faculty and administration of Federal and State institutions. The cases are familiar. Evans v. Newton, 382 U.S. 296 (1966), Terry v. Adams, 345 U.S. 461 (1953), Marsh v. Alabama, 326 U.S. 501 (1946), Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), Louisiana High School Athletic Association v. St. Augustine High School, 396 F.2d 224 (5th Cir., 1968); Powe v. Miles, 407 F.2d 73 (2nd Cir., 1968), Guillory v. Tulane Educational Fund, 203 F.Supp. 855 (E.D. La. 1962).

[23] The court's opinion contains an unnumbered introductory section (App. A-1-3), Section I dealing with the antitrust issue (App. A-3-6), Section II concerning the common law issue (App.A-7-14), and Section III concerning the constitutional issue (App. A-14-15). The question of reasonableness is not discussed in the antitrust section, as the court held that the Sherman Act does not apply to Middle States' activities. Nor is the question of reasonableness discussed in the constitutional section, the court merely concluding that "[f]or the reasons already discussed" Webster had failed to carry its burden of proving the proprietary standard unreasonable. Therefore, the court's conclusion on the constitutional issue that Webster had failed to carry its burden is based only upon its conclusion under the common law issue.

> "[T]he extent to which deference is due to the professional judgment will vary both with the subject matter at issue and *with the degree of harm resulting from the association's action*." (App. A-8, footnote omitted, emphasis supplied).

The "subject matter at issue" was quickly disposed of in note 28, where the court indicates that deference is appropriate when the standards under review are substantive rather than procedural. The court then considered the degree of harm from the challenged exclusion and concluded that Webster would be able to operate successfully as a junior college without Middle States' accreditation (App. A-9-11).[24] Having reached this preliminary conclusion, the court *then* proceeded to consider the reasonableness of the exclusion, in light of its view "... that judicial review of appellant's standards should accord substantial deference to appellant's judgment regarding the ends that it serves and the means most appropriate to those ends." (App. A-11). Applying this "substantial deference" test, the court found the exclusion not to be unreasonable.

In thus applying its own common-law test—a test foreign to due process and equal protection analysis—the court below ruled in effect that constitutional limitations upon the actions of private groups exercising governmental powers are less restrictive than those applicable to governments. The law is to the contrary. Once it is determined that the Constitution applies to actions by private groups that stand as governments, it applies in all its rigor. *Evans v. Newton*, 382 U.S. 296 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326

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[24] This conclusion was reached contrary to specific findings by the trial court without any discussion of Rule 52 of the Federal Rules of Civil Procedure of the "clearly erroneous" test. It was based, in part, on a flat misconception of the laws concerning federal funding. (See note 8, *supra*.) It is not, of course, accepted by Webster, but is not considered in this petition.

U.S. 501 (1946); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Louisiana High School Athletic Association v. St. Augustine High School*; 396 F.2d 224 (5th Cir., 1968); *Powe v. Miles*, 407 F.2d 73 (2nd Cir., 1968); *Guillory v. Tulane Educational Fund*, 203 F.Supp. 855 (E.D. La. 1962).

Among other things, the application of the rule of equal protection today requires consideration of the nature of the interest asserted by the party claiming a denial of equal protection.[25] Webster received no such consideration of its interest here. It is clear that if such consideration were had it would be concluded that the interest asserted is a fundamental constitutional right. Such a right cannot be abridged and its exercise cannot be subjected to discriminatory burdens unless the abridgment or discrimination is shown to be necessary to promote a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

The traditional equal protection test requiring only a rational relationship to permissible purpose is generally applied in the area of economic regulation. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Westbrook v. Mihaly*, ____Cal.____, ___P.2d___, 39 L.W. 2046 (Cal. Sup. Ct., June 30, 1970). The "compelling interest" test is applied when exercise of a fundamental right is discouraged or prevented by governmental classification. This Court recently held the right to travel to be a "fundamental" right, despite substantial disagreement concerning the origin of that right. *Shapiro v. Thompson, supra* at 634, 644-670. Other rights held fundamental, as indicated by this Court's citations in support of the compelling interest test in *Shapiro v. Thompson* include

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[25]The Fifth Amendment, as well as the Fourteenth Amendment, forbids arbitrary and discriminatory classification and denial of equal protection of the laws. Shapiro v. Thompson, 394 U.S. 618, 641-642 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

marriage and procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); the civil rights of a racial group, *Korematsu v. United States*, 323 U.S. 214, 216 (1944); the right of free association, *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); and the First Amendment right to practice one's religion freely, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In particular, rights guaranteed by the First Amendment are invariably classed as fundamental. *Cantwell v Connecticut*, 310 U.S. 296 (1940) (freedom of religion); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of press).

The right to operate a proprietary educational institution and to teach in this form of institution is vital and fundamental. It is more basic than the constitutional right to travel which was so carefully protected in *Shapiro v. Thompson*. It is not only a property right guaranteed by the Fifth and Fourteenth amendments, it is so closely related to rights of free speech and association that it enjoys the protection of the First Amendment.[26]

This intimate relationship between teaching and fundamental freedoms was recognized in *Pierce v.*

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[26]See Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964), concerning the close relationship of freedom to travel and freedom of speech. That the undertaking to teach is more than a simple property right is beyond dispute. "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. 479, 487 (1960). The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). The right to teach in a manner which cannot reasonably be regarded as harmful, is within the "liberty" assured by the due process clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). See also, *Developments in the Law, Academic Freedom*. 81 Harv. L. Rev. 1045 (1968).

Society of Sisters of Holy Names, 268 U.S. 510 (1925). There, the State of Oregon had passed a law requiring all children to attend public schools. A Catholic school and a *proprietary* military academy attacked this governmental discrimination. Recognizing that "... the fundamental theory of liberty ..." prevents a state from standardizing education in public form (268 U.S. at 510), the Court applied an equal protection test at least as strict as the "compelling interest" test. Since operation of a proprietary educational institution is "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious," this right may not be abridged by state action in the absence of "*peculiar circumstances or present emergencies which demand extraordinary measures* ..." (268 U.S. at 534-535, emphasis supplied). This formulation of the special burden which must be carried when state action discriminates against proprietary educational institutions is a precursor of the modern "compelling interest" test. Though Webster vigorously argued application of this strict test before the Court of Appeals, it was not even discussed in the opinion.

Petitioner recognizes, of course, that the state action challenged in *Pierce* would have resulted in virtual elimination of proprietary education, while Middle States' state action in the instant case merely inhibits Webster's operation,[27] and does not destroy its right to teach. However, destruction of a constitutional right by discriminatory state action is not a prerequisite to application of the "compelling interest" test. In *Shapiro v. Thompson, supra*, for example there was no outright denial of the right of the poor to travel. The right was merely inhibited by the welfare residence requirements.

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[27] The inhibition of operation without accreditation is quite self-evident, stigmatizing an institution as inferior and limiting referral of students to the school by guidance counselors. In addition, students who wish to obtain Government aid under the National Defense Student Loan program and College-Work Study programs may not attend Webster. (See note 8, *supra*.)

Similarly, in *Bates v. Little Rock, supra*, the right of free association was not denied, but merely inhibited by submission of the names of the members of the NAACP; in *Sherbert v. Verner, supra*, the state did not prohibit worship by a Seventh Day Adventist, it merely inhibited the exercise of this religion by unreasonable unemployment compensation rules. As the California Supreme Court recently remarked, in applying the "compelling interest" test to voting laws:

> "[T]here is no U.S. Supreme Court decision intimating that states may restrict or infringe voting rights upon a mere showing of some rational relationship to a valid purpose, so long as they stop short of outright denial. State laws denying or diluting the right to vote must be tested by the same stern standard. Therefore, it is clear to this Court that the provision is valid only if it can be shown necessary to promote a compelling state interest." *Westbrook v. Mihaly, supra.*

A brief analogy brings the constitutional question into sharper focus. If the Federal Government decreed that institutions of higher education could use only those textbooks printed by nonprofit organizations, and if the reasons for this decree were comparable to those of Middle States,[28] it would be found unconstitutional.[29] The principles in the instant case are identical. A proprietary college teaches; a textbook produced by a proprietor teaches. The exercise of this precious freedom

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[28] I.e., the profit motive creates an inherent conflict between profits and excellence; only a board of trustees can be trusted to protect the public interest in these vital books; a publisher must devote its total resources to the advancement of its textbook program.

[29] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968). Cf. Epperson v. Arkansas, 393 U.S. 97 (1968). declaring unconstitutional a state law forbidding selection of or teaching from textbooks teaching Darwinian theory.

to teach has been restrained by discriminatory state action. This cannot be tolerated in a society protected by the Constitution.

C. Reasonableness.

Although petitioner contends that the improper test fashioned by the circuit court to determine the reasonableness of state action by a private association is a sufficient reason for granting the writ, it does not assert the need for review of the court's substantive determination of the reasonableness of Middle States' action as an independent basis for certiorari. However, since reasonableness is so deeply involved in the antitrust and constitutional issues, the record evidence on the issue will necessarily be treated in full argument of the case should the writ be granted. For a brief discussion of the factual and opinion evidence supporting the trial court's conclusion that the challenged restriction is unreasonable, see pp. 6-10, *supra*.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be issued.

Respectfully submitted,

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September, 1970

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,351

MARJORIE WEBSTER JUNIOR COLLEGE, INC., A CORPORATION

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC., A CORPORATION, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Decided June 30, 1970

Before BAZELON, *Chief Judge*, and LEVENTHAL and MACKINNON, *Circuit Judges*.

BAZELON, *Chief Judge*: Middle States Association of Colleges and Secondary Schools, Inc., is a voluntary nonprofit educational corporation, the successor to an unincorporated association of the same name established in 1887. Its general purposes are to aid and encourage the development of quality in secondary schools and institutions of higher education located within its geographical domain (New York,

New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia) or outside of the continental United States. Chief among its activities is that of accrediting member institutions and applicants for membership.[1] Marjorie Webster Junior College, Inc., is a proprietary junior college for women located in the District of Columbia. In 1966, it applied to Middle States for accreditation. Relying upon a policy statement of the Federation of Regional Accrediting Commissions of Higher Education,[2] and upon its own past practice,[3] Middle States refused to consider Marjorie Webster for accreditation because the latter was not "a nonprofit organization with a governing board representing the public interest." Following this refusal, Marjorie Webster brought suit to compel its consideration for accreditation without regard to its proprietary character. The District Court found Middle States' refusal to consider proprietary institutions of higher education for accreditation a violation of § 3 of the Sherman Act[4] and of the developing common law regarding exclusion from membership in private associations; in addition, it found that Middle States' activities in the field of accreditation were sufficiently under the aegis of the Federal Government as to make applicable the limitations of the Due Process Clause; and that to deny

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[1] Accreditation by Middle States is concomitant with membership.

[2] The Federation, which is made up of Middle States and the five other regional liberal arts accrediting associations, was established in 1964 to coordinate the policies of the six associations, to speak for them in matters of common interest, and to exchange information, experience, and personnel.

[3] Middle States has never accredited or evaluated a proprietary institution of higher education. This restriction has been explicit since at least 1928. Middle States has, however, accredited three proprietary secondary schools and continues to do so.

[4] 15 U.S.C. § 3 (1964).

accreditation to all proprietary institutions solely by reason of their proprietary character was arbitrary and unreasonable, in violation of the Fifth Amendment. Concluding, finally, that continued denial of consideration for accreditation would result in irreparable injury to Marjorie Webster, the District Court enjoined Middle States from denying Marjorie Webster accreditation solely because of its proprietary character, and ordered it to accredit Marjorie Webster if it should otherwise qualify for accreditation under Middle States' standards.[5] On the application of Middle States, we stayed the District Court's order pending our determination of this appeal. For the reasons hereafter set forth, we conclude that the Sherman Act is not applicable to Middle States' conduct as indicated by the present record; that the circumstances are not such as to warrant judicial interference with the accreditation and membership policies of Middle States; and that, assuming the Due Process Clause to be applicable, Marjorie Webster has not sustained its burden of showing the irrationality of the policy in question as applied to bar consideration of Marjorie Webster for accreditation. Accordingly, we reverse the judgment of the District Court.

I.

Appellee strongly urges, and the court below concluded,[6] that once it be determined that appellee is engaging in "trade," restraint of that "trade" by appellant's conduct is subject to the limitations of the Sherman Act.[7] If this were

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[5] *Marjorie Webster Junior College, Inc., v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 302 F. Supp. 459 (D.D.C. 1969).

[6] *Id.* at 466.

[7] Appellee does not suggest that appellant's accreditation activities constitute a *per se* violation of the Act, but only that the "rule of reason" should apply.

the ordinary case of a trade association alleged to have transgressed the bounds of reasonable regulation designed to mitigate the evils afflicting a particular industry,[8] this reasoning might be conclusive.[9] But in our view, the character of the defendant association, and the nature of the activities that it regulates, require a finer analysis.

Despite the broad wording of the Sherman Act,[10] it has long been settled that not every form of combination or conspiracy that restrains trade falls within its ambit.[11] For the language of the Act, although broad, is also vague; and in consequence of that vagueness, "perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in light of its legislative history and of the particular evils at which the legislation was aimed."[12] The Act was a product of

> the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940).

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[8] *See, e.g., Sugar Institute, Inc., v. United States*, 297 U.S. 553 (1936); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *compare Silver v. New York Stock Exchange*, 373 U.S. 341 (1967).

[9] *See American Medical Ass'n v. United States*, 72 U.S. App. D.C. 12, 110 F.2d 703, *cert. denied*, 310 U.S. 644 (1940).

[10] Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia . . . is declared illegal.

15 U.S.C. § 3 (1964).

[11] *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911).

[12] *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) (footnote omitted).

"The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." [13]

That appellant's objectives, both in its formation and in the development and application of the restriction here at issue, are not commercial is not in dispute.[14] Of course, when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality.[15] But the proscriptions of the Sherman Act were "tailored . . . for the business world," [16] not for the noncommercial aspects of the liberal arts and the learned professions.[17] In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession,[18] is not sufficient to warrant appli-

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[13] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959).

[14] *See* 302 F. Supp. at 466.

[15] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

[16] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961).

[17] *Compare Greene v. Howard University*, 134 U.S. App. D.C. 81, 88, 412 F.2d 1128, 1135 (1969).

[18] *Compare American Medical Ass'n v. United States*, 317 U.S. 519, 528-29 (1943):

> As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the *purpose and effect* of their conspiracy was . . . obstruction and restraint of the business of Group Health. . . . Whether the conspiracy was *aimed at* restraining or destroying competition, or had *as its purpose* a restraint of the free availability of medical or hospital services in the market, the *Apex* case

cation of the antitrust laws.

We are fortified in this conclusion by the historic reluctance of Congress to exercise control in educational matters.[19] We need not suggest that this reluctance is of such depth as to immunize any conceivable activity of appellant from regulation under the antitrust laws.[20] It is possible to conceive of restrictions on eligibility for accreditation that could have little other than a commercial motive; and as such, antitrust policy would presumably be applicable.[21] Absent such motives, however, the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself.[22] We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act.

[*supra* note 12] places it within the scope of the statute. [emphasis supplied]

See also United States v. Oregon Medical Society, 343 U.S. 326, 336 (1952); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935).

[19] *E.g.*, 20 U.S.C. § 401 (1964): "The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education." *Id.* § 402: "Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system."

[20] Compare the treatment of labor unions in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945).

[21] For example, if accreditation were denied any institution purchasing textbooks from a supplier who did not provide special discounts for association members, it would be hard to imagine other than a commercial motive for the action.

[22] See text at note 36 *infra*.

II.

The increasing importance of private associations in the affairs of individuals and organizations has led to substantial expansion of judicial control over "The Internal Affairs of Associations not for Profit." [23] Where membership in, or certification by, such an association is a virtual prerequisite to the practice of a given profession, courts have scrutinized the standards and procedures employed by the association notwithstanding their recognition of the fact that professional societies possess a specialized competence in evaluating the qualifications of an individual to engage in professional activities.[24] The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction.[25] Even where less than complete

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[23] This is the title of Professor Chafee's germinal articles published in 43 HARV. L. REV. 992, 1023 (1930). For more recent surveys, see, *e.g.*, *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963); Note, *Exclusion from Private Associations*, 74 YALE L.J. 1313 (1965).

[24] The leading case is *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961). *See also James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (Calif. 1945); *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 75 Cal. Rptr. 712 (Ct. App. 1969).

[25] *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665 (1968). The classic statement of the rationale for judicial intervention is that of the New Jersey Supreme Court in *Falcone*, *supra note* 24, 170 A.2d at 799:

> When courts originally declined to scrutinize admission practices of membership associations they were dealing with social clubs, religious organizations, and fraternal associations. Here the policies against judicial intervention were strong and there were no significant countervailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different factors were in-

exclusion from practice is involved, deprivation of substantial economic or professional advantages will often be sufficient to warrant judicial action.[26]

The extent of judicial power to regulate the standards set by private professional associations, however, must be related to the necessity for intervention.[27] Particularly when, as here, judicial action is predicated not upon a legislative text but upon the developing doctrines of the common law, general propositions must not be allowed to obscure the specific relevant facts of each individual case. In particular, the extent to which deference is due to the professional judgment of the association will vary both with the subject matter at issue[28] and with the degree of harm resulting from the association's action.[29]

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volved. The intimate personal relationships which pervaded the social, religious and fraternal organizations were hardly in evidence and the individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration.

[26] *Pinsker v. Pacific Coast Soc'y of Orthodontists*, *supra* note 24.

[27] "All grants of power . . . are subject to the inherent limitation that the power shall be fairly used for the purpose for which it is conferred." *Sacher v. United States*, 343 U.S. 1, 29 (1952) (Frankfurter, J., dissenting).

[28] Less deference may be due professional judgment when the question is not one of substantive standards, but rather one concerning the fairness of the procedures by which the challenged determination was reached. In the present case, however, no such issue is raised.

[29] In the present context, where the question is one of the validity of a general standard, we see no benefit to be gained for our analysis by consideration of the distinction sometimes drawn between cases involving admission to, and those involving expulsion from, professional associations. *E.g.*, *Hurwitz v.*

New York, New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, Puerto Rico, the Canal Zone and the Virgin Islands. Middle States, one of six nationally recognized regional accrediting associations, prepares and maintains a list of accredited institutions of higher education which is published and given national distribution by the American Council on Education.

Accreditation is the process whereby an association or agency recognizes an institution as having met certain predetermined standards. The process as employed by defendant involves establishment of standards of quality and identification of those institutions which have achieved them. It seeks to determine in broad qualitative terms whether an institution has clearly defined and appropriate objectives, whether it has established conditions under which it can reasonably be expected to attain them and whether it appears to be attaining them and may be able to continue to do so. The process involves self-evaluation by the institution, evaluation by a visiting team drawn from Middle States' membership, and action upon the report of that team by the Commission on Institutions of Higher Education. Institutions identified as meeting and maintaining announced standards appropriate to the educational activities in which they are engaged are accredited. Membership in Middle States is concomitant with accreditation by the Commission on Institutions of Higher Education or the Commission on Secondary Schools.

Defendant's membership includes 346 nonprofit institutions of higher education (universities, colleges, junior colleges and specialized institutions). Approximately 106 of these institutions are state or municipal universities, colleges or junior colleges; 83 are private non-sectarian institutions, 137 are private church related or controlled universities, seminaries or junior colleges, 15 are specialized institutions with concentrated courses of instruction in music, optometry, pharmacy and textiles, one is a special private institution for the deaf,

three are federally sponsored military academies and one is a federally sponsored junior college. The membership also includes certain institutions outside the United States assigned to Middle States by agreement among the regional associations.

In 1964 the Commission on Institutions of Higher Education of Middle States, the Commission on Institutions of Higher Education of the New England Association of Colleges and Secondary Schools, Inc., the Commission on Colleges and Universities of the North Central Association of Colleges and Secondary Schools, Inc., The Commission on Higher Schools of the Northwest Association of Secondary and Higher Schools, the Commission on Colleges of the Southern Association of Colleges and Schools, Inc., and the Accrediting Commission for Senior Colleges and Universities and the Accrediting Commission for Junior Colleges of the Western Association of Schools and Colleges established the Federation of Regional Accrediting Commissions of Higher Education (herein the Federation) to represent the six accrediting agencies in matters of common interest, to establish policies and procedures, and to exchange information, experience, and personnel. At its initial meeting in March 1964 the Federation issued a policy statement on eligibility for accreditation. One of the six eligibility criteria was the requirement that "The institution should be a nonprofit organization with a governing board representing the public interest."

Plaintiff contends that defendant and its members have formed a combination or conspiracy in restraint of the plaintiff's trade in the District of Columbia in violation of Section 3 of the Sherman Act. It alleges that this combination or conspiracy results from the combining of the members into an association which has acquired monopoly power over regional accreditation in this area and is unreasonably exercising this power in such manner as to prevent or inhibit competition from proprietary institutions. Plaintiff claims that many accredited senior

therefore, that the record supports the conclusion that appellee will be unable to operate successfully as a junior college unless it is considered for accreditation by appellant.

Accordingly, we believe that judicial review of appellant's standards should accord substantial deference to appellant's judgment regarding the ends that it serves and the means most appropriate to those ends. Accreditation, as carried out by appellant, is as involved with educational philosophy as with yardsticks to measure the "quality" of education provided. As found by the trial court,

> [Appellant] seeks to determine in broad qualitative terms whether an institution has clearly defined appropriate objectives, whether it has established conditions under which it can reasonably be expected to obtain them, and whether it appears to be obtaining them. Under this criteria [*sic*], Middle States, in its publication, The Nature of a Middle States Evaluation, notes that "Organization, administration, facilities, and resources are not important in themselves." Accreditation means that the institution has achieved quality within the context of its own aims and program—not that such institution is more qualified than any other accredited or unaccredited institution.[36]

Appellee does not challenge this view of the accreditation process as improper. And given this view, we cannot say that appellant's refusal to consider proprietary institutions is an unreasonable means of seeking to reach the ends sought. Of course no institution, no matter how well endowed, can afford to entirely ignore the balance sheet. But when the institution itself is responsible in large part for setting the measure by which it is to be judged, we do not think it has been shown to be unreasonable for appellant to conclude that the desire for personal profit might influence educational goals in subtle ways difficult to detect but destructive, in the long run, of that atmosphere of academic

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[36] 302 F. Supp. at 474.

inquiry which, perhaps even more than any quantitative measure of educational quality, appellant's standards for accreditation seek to foster.[37] Likewise, we may recognize that, even in nonprofit institutions, the battle for academic freedom and control of educational policy is still sporadically waged; but this factor would seem to strengthen, rather than weaken, the reasonableness of appellant's judgment that motives of personal profit should not be allowed to influence the outcome.[38] Finally, we need not say that appellant's views of the proper measure for accreditation of an educational institution are the only, the best, or even particularly well chosen ones. The core of appellant's argument is not that proprietary institutions are unworthy of accreditation, but rather that they, like many trade and professional schools, should properly be measured by standards different from those used by appellant, and which appellant is possessed of no special competence or experience in using. In this regard appellee is unlike the individual denied membership in or certification by a professional society. Rarely, if ever, could it be said that such an individual could realis-

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[37] Needless to say, a failing institution may be forced to sacrifice its own view of educational quality for economic reasons, and doubtless even the best-endowed university would be grateful for additional funds to spend on education. But where funds may not be siphoned off from educational purposes, even the most stringent budget-cutting must find its limit. We need not here decide how or whether our conclusion would differ if appellee could show that its profits could never exceed a certain amount or percentage of income, in which case the profit-taking aspect of its operations would, as in the case of nonprofit institutions, have a definite limit.

[38] Appellee rightly points out that proprietary as well as nonproprietary institutions could, in theory, establish a system of academic tenure and faculty control of academic policy. Appellee, however, has established neither; and we think that judicial consideration of the consequences of any such systems, if established, should await their existence.

tically be expected to combine with others excluded on the same grounds [39] to form his own association. Appellee, however, is free to join with other proprietary institutions in setting up an association for the accreditation of institutions of such character; and such an association, if recognized,[40] could obtain for its members all the benefits of accreditation by appellant save, perhaps, prestige. Appellee has made no attempt to show that any such course has ever been attempted. In these circumstances, we do not think that appellant's refusal to consider appellee for accreditation as a proprietary institution lacks sufficient basis in reason to warrant judicial intervention.

In reaching this conclusion, we need neither disregard nor disbelieve the extensive testimony introduced by appellee below regarding the values and benefits, both for the educational process and for the country as a whole, that flow from proprietary educational institutions. We do not conclude, nor does appellant even suggest, that competition from proprietary institutions is anything but wholesome for the nonprofit educational establishment. We merely find that, so far as can be discerned from the present record, appel-

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[39] Of course, if the exclusion were not pursuant to a general policy but directed solely towards an individual person or organization, even this possibility would be lacking. Accordingly, judicial scrutiny of the even-handed application of purported standards of exclusion is correspondingly more stringent. *Compare Pinsker v. Pacific Coast Soc'y of Orthodontists*, *supra* note 24.

[40] Accrediting agencies are accorded formal recognition by the National Commission on Accrediting. Comment, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 CORNELL L.Q. 104, 105-06 (1966). In addition, the Commissioner of Education is instructed to "publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of training offered." 20 U.S.C. § 403(b) (Supp. IV, 1969).

lant does not wield such monopoly power over the operation of educational institutions that its standards for accreditation may be subject to plenary judicial review; and that in light of the substantial latitude that must accordingly be allowed appellant in setting its criteria for accreditation, appellee's exclusion solely on the basis of its proprietary character is not beyond the bounds of appellant's allowable discretion.

III.

What has been said above should also dispose of so much of appellee's argument as is based upon the Due Process Clause. We may assume, without deciding, that either the nature of appellant's activities [41] or the federal recognition which they are awarded [42] renders them state action subject to the limitations of the Fifth Amendment.[43] If so, however, the burden remains with appellee to show the unreasonableness of the restriction,[44] not simply in the abstract but as applied specifically to it.[45] We need not decide here the precise limits of those circumstances under which governmental action may restrict or injure the activities of proprietary educational institutions. For the reasons already discussed,[46] we conclude that appellee has failed to show that

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[41] *Compare Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

[42] *See* note 32 *supra*.

[43] *See generally Adickes v. S. H. Kress & Co.*, —— U.S. ——, —— - ——, 38 U.S.L.W. 4434, 4445-49 (1970) (Brennan, J., concurring and dissenting), and cases cited.

[44] *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962).

[45] *Compare United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

[46] Notes 30-41 *supra* and accompanying text.

the present restriction was without reasonable basis. Accordingly, it must be upheld.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Marjorie Webster Junior College, Inc., Plaintiff

v.

Middle States Association of Colleges and Secondary Schools, Inc., Defendant

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Civil Action No. 1515-66

July 23, 1969

OPINION

JOHN LEWIS SMITH, Jr., District Judge.

Plaintiff, Marjorie Webster Junior College, Inc., brings this action under the antitrust laws of the United States and specifically under the provisions of Section 3 of the Sherman Antitrust Act[1] and Section 16 of the Clayton Act.[2] Jurisdiction is invoked under the provisions of 28 U.S.C. § 1337 vesting original jurisdiction of actions involving the antitrust laws in the district courts of the United States and under Section 11–521 of the D.C.Code (1967 ed.). A second count seeks relief under the Constitution and the common law controlling the activities of private associations.

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[1] 15 U.S.C. § 3.

The case arises out of plaintiff's desire to obtain regional accreditation for the institution it operates in the District of Columbia. Defendant has refused to evaluate the merits of plaintiff's educational program for accreditation, basing its refusal upon defendant's rule of eligibility which provides that to be considered for evaluation for accreditation an institution must be a nonprofit organization with a governing board representing the public interest.

Marjorie Webster Junior College (herein Webster) is a proprietary corporation organized in 1927 for educational purposes under the District of Columbia law (D.C.Code § 29-601, 1967 ed.). All of the stock is held by members of the Webster family. Since incorporation it has operated in the District of Columbia as a junior college for women with courses in seven departments, including a department of Liberal Arts. It offers both terminal and transfer courses. Most students who take terminal courses seek no additional formal education after graduation. The transfer courses, however, are designed for students who desire to continue their education by transferring with credits earned at Webster to other institutions offering four year courses. Plaintiff was accredited by the District of Columbia Board of Education pursuant to D.C.Code § 31–120 (1967 ed.) in 1947 and has awarded the degree of Associate in Arts to approximately 2,300 graduates who have satisfactorily completed the prescribed course of study.

Middle States Association of Colleges and Secondary Schools, Inc. (herein Middle States) is a nonprofit educational corporation chartered under the laws of the State of New York on May 27, 1966 for the improvement and development of educational institutions, relationships and services. Its predecessor was Middle States Association of Colleges and Secondary Schools, an unincorporated nonprofit association established in 1887. Defendant conducts a program of evaluation and accreditation of institutions of higher and secondary education located in

With these factors in mind, we turn to consider the harm appellee will suffer by virtue of the challenged exclusion. We note in this regard that denial of accreditation by Middle States is not tantamount to exclusion of appellee from operating successfully as a junior college. It has been, and without regard to accreditation by appellant will remain, accredited by the District of Columbia Board of Education, and licensed to award the Associate in Arts degree.[30] The record indicates that appellee's listing in the major publications available for use by high school guidance counsellors (and often, by students and their families) does not depend upon its accreditation by appellant.[31] Appellee's lack of accreditation does not appear to render it, or its students, ineligible to receive federal aid.[32] Appellee's stu-

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Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966). In either case the critical question would seem to be the extent of harm suffered by the person excluded or expelled.

[30] We need not and do not express any opinion on the question, argued both here and in the court below, whether appellee's local accreditation and licensure are proper.

[31] Appellee is not listed in either the *Junior College Directory*, which lists both accredited and unaccredited institutions but not proprietary ones; or in *Cass & Birnbaum's Guide to American Colleges*, which lists only four-year colleges. It is fully listed in *Lovejoy's College Guide*; *Barron's Guide to the Two-Year Institution*; *Chronicle Guidance Publications* and *View Deck*; and the Association of College Admissions Officers' *Admissions Search Kit*. 302 F. Supp. at 475-76.

[32] Eligibility for a number of federal funding programs that provide grants to institutions or their students does turn upon the institution's being accredited by a "nationally recognized accrediting agency" listed by the Commissioner of Education. *See, e.g.*, 20 U.S.C. §§ 403(b)(5) (National Defense Education Act of 1958), 751(f)(5) (grants and loans for construction of academic facilities) (1964 & Supp. IV, 1969). However, as an alternative to such accreditation, an institution or its students will become eligible upon showing that its credits "are accepted

dents seeking to transfer to four-year colleges at the completion of their programs are not necessarily barred from obtaining credit for their studies because of the unaccredited status of the institution.[33] We recognize, as the trial court found,[34] that lack of accreditation may be a not insignificant handicap to appellee both in the effect that such lack may have on students considering application for admission, and in the loss of the substantial benefits that the accreditation process itself has upon the institution under study. But appellee has operated successfully as a junior college since 1947. Although it suffered a decline in applications for admission in the years immediately preceding the instant suit, this decline was shared by the other women's institutions in the District of Columbia. In the last year for which figures were introduced, it received over 100 more applications than Mount Vernon Junior College, the institution receiving the second highest number.[35] We do not believe,

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on transfer by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited." *Id.* §§ 403(b)(5)(B), 751(f)(5). This is known as "three-letter certification," and appellee has such certification at the Office of Education. It appears that appellee is ineligible for federal funds, if at all, because the applicable statutes preclude grants and loans to proprietary liberal arts institutions or their students. *See, e.g.*, 20 U.S.C. §§ 403(b)(4), 403(b)(5)(B) and following material, 751(f)(4) (1964 & Supp. IV, 1969).

[33] It appears that some 34 educational institutions throughout the United States refused to give full credit to appellee's transfer students in the period 1962-1969. Appellee was able to show only 11 such institutions which did so because of its lack of accreditation by appellant. *See also* note 32 *supra*.

[34] 302 F. Supp. at 477.

[35] The number of applicants annually rejected by appellee remained at approximately 200 for the three years last preceding the instant suit.

colleges and universities have rejected and will continue to reject transfer applications and credits from Webster graduates and that it is handicapped in its recruitment of high school graduates because of its lack of Middle States accreditation. Plaintiff contends that it fulfills all the criteria for accreditation and membership except the nonprofit requirement and that defendant's exclusionary policy is unreasonable per se.

The second count in the amended complaint alleges that the accrediting function as practiced by defendant is so inherently governmental in nature that its actions are state actions in a constitutional sense subject to the restraint of due process and that the defendant has acted in an arbitrary, discriminatory and unreasonable manner in rejecting plaintiff's application. Plaintiff alleges that membership in the defendant association is necessary if Webster is to continue successfully as an institution of higher education. It contends that defendant's power is subject to judicial control and must be exercised in a reasonable fashion so that a licensed institution may function to serve the public interest in education.

Webster seeks a permanent injunction enjoining defendant, its officers, trustees, agents, and employees and all persons and organizations acting in concert with it from denying plaintiff eligibility for evaluation and accreditation solely because of its proprietary character and ordering Middle States to accept plaintiff's application for evaluation and to accredit plaintiff if it otherwise qualifies under defendant's standards. Webster also seeks a decree of the court declaring illegal, null and void defendant's requirement that institutions of higher education be "nonprofit organizations with a governing board representing the public interest" to be eligible for evaluation and accreditation by defendant.

Defendant, inter alia, contends that higher education is not trade or commerce within the regulatory ambit of the Sherman Antitrust Act. Middle States avers that its policy with regard to proprietary institutions is

in no way motivated by the desire to protect its members from economic competition from such institutions and that no combination or conspiracy in restraint of trade exists. It denies that it has conspired to eliminate or suppress the competition of proprietary institutions. Defendant admits that accreditation by it is of importance to institutions of higher education but denies that its accreditation is essential to continuing a successful operation of such an institution. If the Sherman Act is applicable, Middle States contends that its actions have been entirely reasonable and completely within the public interest.

With reference to count two, defendant asserts that it is a voluntary membership organization which has the right to set up its own membership criteria. It claims that it was not organized at the request or under the aegis of any governmental agency. Middle States denies that it is exercising a function ordinarily exercised by a government authority in the United States. Even assuming Middle States to be a quasi-governmental agency, defendant avers that its refusal to consider Webster's application for membership is not arbitrary and unreasonable justifying judicial intervention. Middle States further contends that plaintiff has sustained no legally cognizable damage and has no standing to bring this action.

A threshold question exists in this proceeding with respect to venue. In addition to challenging the applicability of the Sherman Act, defendant denies that it "may be found or transacts business" in the District of Columbia. The following provisions of the Clayton Act are pertinent:

> § 12. Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in

such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

§ 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rule governing such proceedings, * * *

At the time of the institution of this suit in June 1966, 28 secondary schools in the District of Columbia were accredited by the Secondary Commission of Middle States and two were candidates for such accreditation. Fifteen institutions of higher education were accredited by the Commission on Higher Education, while two such institutions held "correspondent status." During the period January 1, 1964 to October 16, 1966, 13 secondary schools in the District of Columbia were visited by committees of the Commission on Secondary Schools of Middle States in connection with evaluation for accreditation or review of accreditation. Each visit lasted approximately three days and was preceded by a visit by the Chairman. One of the committees was under the chairmanship of the then Executive Secretary of the defendant's Commission on Secondary Schools. In addition to these visits, the Chairman and Executive Secretary visited the District of Columbia on four occasions between February and May, 1966. Defendant also distributed publications to member schools including "The Selection of a Secondary School," "Middle States Accreditation General Information," and a newsletter to all member institutions in the District of Columbia.

The Executive Secretary of the Commission on Institutions of Higher Education visited the District of

Columbia in connection with the evaluation of institutions for accreditation on ten occasions during the period 1965-1966. Middle States collected dues from its member institutions in the District of Columbia and estimated that its total mail volume to the District of Columbia was 450 pieces annually. It also estimated that staff members placed approximately 275 telephone calls to the District of Columbia between January 1, 1964 and October 15, 1966. The President of Middle States at the time this suit was filed was headmaster of the St. Albans National Cathedral School for Boys in the District of Columbia. During 1966 he attended and arranged meetings of Middle States officers and corresponded and communicated by telephone with the officers and other persons in connection with defendant's affairs. A meeting attended by five of the Middle States officers and the Administrative Secretary was held at St. Albans School in February 1966.

To support the claim that Middle States transacts business in this jurisdiction, plaintiff relies on Levin v. Joint Commission on Accreditation of Hospitals, 122 U.S.App.D.C. 383, 354 F.2d 515 (1965), involving an analogous situation. In *Levin* field inspectors of an Illinois hospital accreditation corporation came to the District to conduct inspections for purposes of accreditation. Although noting that the inspection visits accounted for less than one percent of the Joint Commission's activities, the Court held:

> The business of the Joint Commission is that of accrediting hospitals. Field inspections are an essential aspect of that business. When a field inspector comes to the District of Columbia to inspect a hospital, the Commission is transacting its business there as certainly as when the inspector's report is reviewed and acted upon in Chicago * * * when the Commission's field inspectors come here to perform the inspections without which the Commission's work cannot go

forward, we think the Commission can be said to be transacting its business here to such a degree as to make it answerable here to claims of antitrust violation.[3]

The facts in the two cases are strikingly similar. It is evident that Middle States' contacts with the District of Columbia are sufficient in nature and degree to permit suit under Section 12 of the Clayton Act (15 U.S.C. § 22).

Jurisdiction and venue for count two are premised on the provisions of 28 U.S.C. § 1391; D.C.Code § 11–521 (1967 ed.); and jurisdiction pendent to the court's jurisdiction of the antitrust action set forth in count one. Jurisdiction under 28 U.S.C. § 1391(c) depends upon whether a corporation is "doing business" and D.C.Code 11–521(a)(1) requires that the party be "found" within the District. In Friedman v. United States Trunk Company, 204 F.Supp. 366 (S.D.N.Y.1962), the Court found no difference between "transacts business" as used in 15 U.S.C. § 22 and "doing business" in 28 U.S.C. § 1391(c), and United States v. Scophony Corporation of America, 333 U.S. 795, 68 S.Ct. 855, 92 L.Ed. 1091 (1948), equated the concept "found" with the words "transacts business." See also Kelberine v. Societe Internationale, etc., 124 U.S.App.D.C. 257, 363 F.2d 989 (1966); Washington v. Hospital Service Plan of New Jersey, 120 U.S.App.D.C. 211, 345 F.2d 105 (1965); Bilbrey v. Chicago Daily News, 57 F.Supp. 579 (D.C.D.C.1944); and Stevens v. American Service Mutual Insurance Company, D.C.App., 234 A.2d 305 (1967).

The test of jurisdiction and venue is whether a corporation has made its presence felt in a particular area to advance its essential business purposes. Although it maintains no Washington office, the extent of its

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[3]See also Semel Associates, Inc. v. United Fireworks Mfg. Co., Inc., 122 U.S.App.D.C. 402, 355 F.2d 827 (1965).

activities here clearly indicates that Middle States can be "found" and is "doing business" in the District of Columbia as contemplated by the statutes.

Since jurisdiction and venue have been established, it is unnecessary to consider Webster's additional reliance on the doctrine of pendent jurisdiction for count two. However, the unanimous opinion of the Supreme Court in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), lends support to plaintiff's view:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Both counts of the amended complaint in the instant case allege the identical injury and request the same relief. Common questions of law and fact are involved which can be tried more expeditiously in one judicial proceeding.

A new and pivotal question here for determination is the applicability of the antitrust laws to the field of education. Is higher education, including the accreditation of institutions, trade or commerce and thus within

the regulatory scope of the Sherman Act? Defendant contends that the legislative history of the Act demonstrates that it was intended to apply to the commercial world and not to the professions. Middle States emphasizes that the law was designed to break up the large trusts formed after the Civil War and to promote competition. Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 49–62, 31 S.Ct. 502, 55 L.Ed. 619 (1911); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); and Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). Denying that it is engaged in commercial activities, defendant cites the traditional definition of "trade" contained in The Schooner Nymph, 1 Sumn. 516, 18 Fed. Cas. 506, No. 10,388 (1834):

> Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood not in the liberal arts or in the learned professions, it is constantly called a trade.

Middle States asserts that "trade" has never been interpreted by the courts to extend to non-commercial activities such as the learned professions into which category it should be placed.

In the first American Medical Association (herein AMA) decision, United States v. American Medical Association et al., 72 U.S.App.D.C. 12, 110 F.2d 703 (1940), the United States Court of Appeals for the District of Columbia comprehensively reviewed the genesis and legal development of the word "trade" and held that the term as used in the Sherman Act included the medical profession. Chief Judge Groner concluded that the effect of all the English and American cases was "to enlarge the common acceptation of the word 'trade' when embraced in the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood."

In the second AMA case, American Medical Association v. United States, 76 U.S.App.D.C. 70, 130 F.2d 233

(1942), the Court of Appeals again included the medical field in the meaning of the word "trade" in the antitrust context. The Court held that Group Health Association, the organization which had been the victim of the AMA restraints, was clearly engaged in trade or commerce even though it was a nonprofit organization. It also found that hospitals in the District of Columbia—some charitable, some nonprofit, some proprietary—were engaged in trade and commerce within the meaning of the Sherman Act. (76 U.S.App.D.C. at 74-75, 130 F.2d 233). The Court said at p. 74, 130 F.2d at p. 237, "It is not necessary, in order to constitute trade or business, that it shall be carried on for profit," citing Hazen v. National Rifle Ass'n., 69 App.D.C. 339, 345, 101 F.2d 432, 438 (1938).

The myriad financial considerations involved in building programs, teachers' salaries, tuitions and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion.[4] Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality.

Webster rightly contends that attention should be focused on its activities rather than the defendant's

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[4]Quality and equality: new levels of federal responsibility for higher education, Carnegie Commission on Higher Education, December, 1968.

because the question is not whether the defendant association is engaged in trade but whether plaintiff's trade has been restrained. The Supreme Court held in the third AMA case that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged. American Medical Association v. United States, 317 U.S. 519, 528, 529, 63 S.Ct. 326, 87 L.Ed. 434 (1943). Webster is a corporation engaged in business for profit. Its corporate activity consists of offering educational facilities and services in exchange for the tuition charged students. The income received is spent for faculty salaries, maintenance of buildings, equipment and grounds, and board for students. Webster pays all taxes, such as income, property, sales and payroll, customarily paid by business corporations. Middle States can hardly deny that plaintiff is engaged in trade since the plaintiff's proprietary character is the reason for the membership exclusion and the *sine qua non* of this proceeding.

The specific section of the Sherman Act upon which count one is based provides:

> Every contract, combination in form or trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. * * * (15 U.S.C. § 3)

Plaintiff does not contend that the members of Middle States conspired specifically to restrain its trade nor that the six regional associations formed the Federation for that purpose. The evidence negates the existence of any evil, purposeful plotting by the defendant and Webster concedes that the reason for combining was honorable and

laudable. However, it is clearly apparent that the intent to combine was present in each case and that the two associations, by their very formation, represent combinations and did enter into contracts.

A combination which imposes unreasonable restraints on the trade of others is actionable under the Act. An intent to restrain trade is not an essential element of the proof. The burden is met if it is shown that the consequences flowing from the activity complained of amounted to a restraint of trade. In United States v. Griffith et al., 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948), the Court stated:

> It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.

See also, United States v. Patten, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333 (1913); United States v. Masonite Corporation, 316 U.S. 265, 62 S.Ct. 1070, 86 L.Ed. 1461 (1942); and United States v. Columbia Steel Company, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948). Moreover, a laudatory purpose or intent will not excuse violations of the laws. "Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry * * * is sufficient to void the penalties of the Sherman Act." American Medical Association v. United States, 76 U.S.App.D.C. 70, 73, 130 F.2d 233 (1942). Also, it is not necessary that the restraint result in total exclusion from the market. A violation of the antitrust laws exists if the combining results in a special advantage to members of an association over non-members or deprives the non-member of a significant business service. Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

Certain practices, such as price fixing, are conclusively presumed to be unreasonable and therefore illegal per se because of their harmful effect on competition and lack of any redeeming virtue. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). The combination or contract involved in the instant case is not so devoid of potential benefit or so inherently harmful as to fall into the above category without proof that it actually had the effect of restraining trade. In the absence of a per se violation, proof is essential that the agreement resulted in an unreasonable restraint of trade. Although there is no single test to determine unreasonableness, Mr. Justice Brandeis established the following guidelines in Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918):

> But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Both Middle States and the Federation have adopted policies which provide that to be eligible for accreditation an institution must be a nonprofit organization with a governing board representing the public

interest. Since Webster is a proprietary institution, defendant has refused to even consider its qualifications for accreditation. In view of the fact that Middle States is the only accrediting agency oriented in purpose and scope to Webster's accrediting needs, this refusal assumes additional importance.

Applying the standards discussed by Mr. Justice Brandeis in Board of Trade of the City of Chicago v. United States, *supra*, the exclusionary criterion must be viewed in the light of defendant's objectives. In other words, does the criterion serve to further, or is it reasonably related to, the stated purpose of the association? Middle States' corporate charter sets forth that the purpose of the association, inter alia, is "* * * to encourage the achievement of higher quality * * * among the higher institutions, secondary schools and other educational agencies in the Middle States." The objectives are concisely set forth in a document published by the Middle States Higher Commission, Middle States Membership and Initial Accreditation, as follows:

> The Middle States Association is an independent membership organization. It admits institutions of higher education to membership through a process of evaluation and accreditation which has a double purpose. One is to serve the education world and the public by establishing standards of quality and identifying institutions which achieve them. The other, equally important, is to stimulate and help institutions reach their maximum effectiveness.

In support of the exclusionary criterion, defendant argues that a proprietary institution is interested in profits and that failure to devote total resources to education will result in an inferior program. The profit motive, Middle States contends, threatens the integrity of the proprietary institution by diverting it from the basic responsibilities of an educational institution. Educational excellence is determined not by the method of financing

but by the quality of the program. Middle States' position, moreover, ignores the alternative possibility that the profit motive might result in a more efficient use of resources, producing a better product at a lower price. Additionally, an efficiently operated proprietary institution could furnish an excellent educational curriculum whereas a badly managed nonprofit corporation might fail. Defendant's assumption that the profit motive is inconsistent with quality is not supported by the evidence and is unwarranted. There is nothing inherently evil in making a profit and nothing commendable in operating at a loss. Furthermore, defendant's position in this regard is weakened by the fact that the Western Association of Schools and Colleges (one of the six regionals) lists three proprietary institutions of higher education in its membership and Middle States itself accredits three proprietary secondary schools.

Webster complains that the lack of regional accreditation stigmatizes the school as being of inferior quality and thereby discourages prospective applicants. It contends that the defendant has acquired monopoly power over the regional accreditation of higher education in the Middle States area. Convincing evidence was adduced that lack of accreditation reflects adversely on the value of credits earned and inhibits the transferability of these credits when Webster graduates seek advanced standing at four year institutions. Testimony was presented indicating that college admission officers place heavy reliance upon the judgments of regional accrediting associations when considering student applications. Likewise, certain college directories and guides do not list Webster because of its non-accredited status, and high school counsellors are hesitant to recommend an unaccredited school because of the difficulties encountered. A survey conducted by Middle States among its membership indicates that 75% of the member institutions impose certain conditions or limitations upon students transferring from non-member schools. The evidence is also undisputed that, with the increased

interest in higher education and the mobility of our society, the regional accrediting associations have grown in importance and prestige. Since the public relies heavily on the judgment of these associations, educational institutions of all types should be evaluated.

Some of the benefits which accrue to institutions of higher learning, the public and students as a result of accreditation are described in the September 1968 edition of Accredited Institutions of Higher Education published by the Federation:

> Accreditation also helps facilitate the evaluation of students' credits for admission or transfer to other institutions. An institution's accreditation warrants the consideration of its academic records at face value when these records are accompanied by clear statements of the institution's aims for the program taken. The acceptability of a record for transfer or other purposes depends, of course, upon the appropriateness of the program followed and the quality of a student's performance in it. But when an institution lacks accreditation, it is obliged to establish some other basis for confidence in its work, and its students' records should be appraised individually.

In view of the foregoing, it is obvious that membership in Middle States results in a special advantage to members of the association over non-members and deprives the non-member of a significant business service. Accreditation is necessary to engage in effective competition in the field of higher education today. The court finds that the exclusionary criterion does inhibit Webster's ability to compete in the field of higher education and does not further the stated objectives of the associations. Such a discriminatory exclusion without evidence to justify it must be found arbitrary and unreasonable. Since the criterion is arbitrary and unreasonable, Webster is entitled to relief.

Much of the evidence adduced in connection with the first count of the complaint applies also to count

two. As previously indicated, identical injury is alleged and the relief requested is the same. Plaintiff contends that although the Constitution of the United States normally limits only action by the government, a private association performing a state function or exercising delegated powers of a governmental nature becomes subject to the restraints of the Constitution, including the due process clause. Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). Plaintiff further insists that when a private organization becomes so powerful that membership in that association is an economic necessity, the power must be exercised in a reasonable manner. Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 A.2d 791, 89 A.L.R.2d 952 (1961); Group Health Cooperative of Puget Sound v. King County Medical Society, 39 Wash.2d 586, 237 P.2d 737 (1951); Higgins v. American Society of Clinical Pathologists, 51 N.J. 191, 238 A.2d 665 (1968). Defendant, on the other hand, denies that membership is an economic necessity and that its refusal to make an exception to its rules for plaintiff is arbitrary and unreasonable. Middle States further denies that its activities are of a quasi-governmental nature and contends that the internal administration of a private association is beyond the reach of judicial review. North Dakota v. North Central Association of Colleges and Secondary Schools, 99 F.2d 697 (7 Cir. 1938); Parsons College v. North Central Association of Colleges and Secondary Schools, 271 F.Supp. 65 (N.D.Ill.1967); Green v. Obergfell, 73 U.S.App.D.C. 298, 121 F.2d 46, 138 A.L.R. 258 (1941); Fish v. Huddell, 60 App.D.C. 263, 51 F.2d 319 (1931); Avin v. Verta, 106 A.2d 145 (D.C.App.1954).

As a general rule, courts adhere to a policy of noninterference with the internal affairs of private voluntary associations. Membership in such a group is considered a privilege and not a right. However, there is an exception when the association enjoys monopoly

power in an area of vital public concern. If the power, because of public reliance upon it, is great enough to make membership a necessity for successful operation, judicial intervention may be justified.

In *Falcone* a county medical society had excluded a duly licensed and registered physician in the State of New Jersey from membership by applying a policy which required four years attendance at an approved medical school. Since hospitals in the area required that a doctor be a member of the society in order to use their facilities, the refusal to admit him had serious adverse effects on the doctor's economic and professional status. In directing the society to admit him to membership, the court recognized the reluctance of courts to interfere with the internal affairs of membership associations, but noted that judicial scrutiny and relief were granted when necessary in cases of expulsion. Turning to the special problem of exclusion, the Court said:

> We are here concerned with * * * an organization, membership in which may * * * be viewed as 'an economic necessity'; in dealing with such an organization, the court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization.

See also: Hurwitz v. Directors Guild of America, 364 F.2d 67 (2 Cir. 1966).

Evidence has been presented that accreditation by Middle States is necessary for plaintiff to continue operating successfully as a junior college. Prominent educators appearing as witnesses in this proceeding expressed divergent views. However, some who are members of the defendant association testified that regional accreditation is more important today than ever before and that lack of it would be harmful to any institution. Accreditation has become the symbol of

academic acceptability, and many states measure the educational excellence of their public institutions by the standards of the regional associations. Furthermore, defendant acts in a quasi-governmental capacity by virtue of its role in the distribution of Federal funds under the "aid to education statutes." Selection of the recipient schools is frequently dependent upon the accredited status of the applicant. Middle States and the other regionals are officially recognized by the United States Commissioner of Education who publishes a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution. 38 U.S.C. § 1653(a).

In addition, the evidence discloses an arrangement between the United States Office of Education and the regional associations relative to the eligibility of institutions which are candidates for but have yet to achieve final accreditation. In 1967 Middle States' practice of attesting to the quality of these institutions through "letters of reasonable assurance" of accreditation was discontinued when the Office of Education agreed to accept in lieu thereof "Correspondent Status" listing as evidence of eligibility for assistance. Mr. John Proffitt, Director of the Accreditation and Institutional Eligibility Staff of the Office of Education testified: "Accreditation has become, fundamentally speaking, a service aspect to the Federal Government in determining eligibility for funding. This has arisen as a result of the language written into Federal funding assistance legislation by Congress."

Over the years Middle States has achieved a position of great influence in American education. It has elevated the quality of education and has become a powerful instrumentality which sets policies in an area of vital concern to the public. Accreditation has been established in the public mind as a mark of distinction and quality.

It confers a significant competitive advantage on defendant's members as distinguished from non-members. In view of the great reliance placed on accreditation by the public and the government, these associations must assume responsibility not only to their membership but also to society. There is need for the application of sound standards in the evaluation of all schools and for increased coordination and understanding throughout the educational world. The regional accrediting associations and the Federation have an opportunity to provide new leadership in orienting their policies toward the broader welfare of society and the public interest.

A crisis exists in higher education today. There is tension, turmoil and unrest on the American campus. Students dissatisfied with established routines and unquestioned goals, are demanding reform. In addition, institutions of higher education are experiencing severe economic pressures, and new methods must be found to meet the challenge. It has become increasingly apparent that the demands of the educational deficit cannot be met exclusively by foundation, state and federal financing. In this connection an excerpt from an editorial written by the President of the University of Oklahoma, Dr. J. Herbert Hollomon, when he was Assistant Secretary of Commerce for Science and Technology, warrants quotation:

> Every year I visit 25 to 50 business firms and 25 to 50 colleges and the contrast in being "business-like" is striking. We would not let a company gain a monopoly and become so entrenched that its services declined. Why should this happen in our educational system? We need the competition of business in education which is now in the domain of city, county, and state government. Getting business more heavily into the educational field is the best way to guarantee competitiveness and

innovation and insure against monopolistic control and exploitation.[5]

With a rapidly expanding population, broad social changes, and the complexities of modern life, higher education in the United States is a matter of national concern. A sound educational system is essential to our pluralistic society. This can best be attained by private nonprofit, proprietary, and public institutions working together toward a common goal—the improvement of higher education.

Webster seeks merely to be given a chance to qualify, but Middle States refuses even to consider its application for academic recognition. This action is arbitrary, discriminatory and unreasonable. The American system of free enterprise is structured on fair and open competition—not monopoly. The national interest is not best served by stifling competition from any available source. With the unprecedented demands upon educational resources in this country, every institution should be given the opportunity to demonstrate its worth. Defendant should accord to non-members an equal opportunity for evaluation at a reasonable cost and on conditions no more onerous than those for members. While precedent in this field is limited, fundamental fairness dictates that plaintiff is also entitled to prevail on count two.

Defendant has abandoned the defenses of Laches, Clean Hands and the Statute of Limitations. The contention that Webster is not a valid degree conferring institution under the laws of the District of Columbia has been carefully considered and found to be without merit.

The Court concludes that defendant, acting in combination with its membership and with the Federation, has unreasonably restrained plaintiff's trade in the District of Columbia in violation of Section 3 of the Sherman Act. Lack of regional accreditation harms and

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[5] Journal of Business Education, May 1967.

inhibits plaintiff in its attempt to compete with institutions which are members of the defendant association and the other regional associations. The Court further finds that defendant's requirement that institutions of higher education be nonprofit organizations with a governing board representing the public interest to be eligible for evaluation and accreditation is unrelated to the legitimate and announced purposes of Middle States and the Federation. This standard for exclusion is arbitrary, unreasonable and contrary to the public interest. Unless enjoined by this Court, defendant's conduct in refusing to consider plaintiff's application for accreditation will cause plaintiff to suffer irreparable injury.

Accordingly, plaintiff is entitled to relief on both counts. An injunction will be issued enjoining defendant from denying plaintiff eligibility for accreditation because of its proprietary character and ordering defendant to accept and evaluate plaintiff's application and to accredit plaintiff if it shall otherwise qualify under defendant's evaluation criteria.

Counsel will submit an order in accordance with this opinion.

Findings of Fact and Conclusions of Law are annexed hereto.

FINDINGS OF FACT

1. Plaintiff, Marjorie Webster Junior College, Inc., was founded in 1920 in the District of Columbia as "The Marjorie Webster School of Expression and Physical Education" and operated as a partnership by Miss Marjorie Webster and her mother until 1927 when it was chartered as a corporation for profit, under Section 599 of the Act of March 3, 1901 (D.C.Code, § 29-601, 1967 ed.). Its name was changed to Marjorie Webster Schools, Inc. in 1930 and to its present name in 1947. Plaintiff is a close corporation in which all of the stock is held by members of the Webster family. The members of the

Board of Directors of the corporation as well as the present administrative officers of the college are all members of the Webster family.

2. Plaintiff's articles of incorporation provide in part:

> To conduct in the District of Columbia * * * a school of physical education and expression, to instuct students in the named and all related subjects, and to issue such certificates and diplomas as may be appropriate to the subject taught and the results accomplished; to do all things necessary and proper for carrying on said school; and in general to do and perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conduct of said business as authorized by the laws of Congress, and to have and to exercise all of the powers conferred by the laws of the District of Columbia upon corporations under said subchapter three (3) of the incorporation laws of the District of Columbia.

3. Plaintiff has operated since 1947 a junior college for women in the District of Columbia known as Marjorie Webster Junior College. It operates two year terminal and transfer courses of instruction. Upon acceptance, students at Webster are advised whether they are being accepted for transfer or terminal credit. Students are admitted specifically as transfer or terminal students. If a student desires to apply to a four-year institution upon completion of her terminal course at Webster, she will not receive a transfer recommendation from Webster.

4. Webster is divided into seven departments of instruction designated as Liberal Arts, Physical Education, Kindergarten Education, Communications (Speech-Drama and Radio-T.V.), Secretarial, Art, and Retail Merchandising.

5. Since 1946 Webster has been accredited as a junior college by the District of Columbia Board of Education.

6. Webster grants the degree of Associate in Arts (AA) in each department to students who have completed the department's curriculum with the required average and number of credit hours. Students who matriculate for a full two years but who fail to maintain the required average are given certificates. Since Webster began awarding the AA degree in 1947, approximately 2,300 degrees have been awarded.

7. Webster uses its income to purchase goods and services required to support a program of instruction and necessary auxilliary services. It pays all taxes customarily paid by a business corporation.

8. The present Webster student enrollment is approximately 470 and it is engaged in the recruitment of students and faculty. Throughout the country institutions of higher education are likewise engaged for students and faculty.

9. Defendant is a voluntary, nonprofit, non-stock, educational corporation, organized under the education laws of the State of New York on May 27, 1966 as the Middle States Association of Colleges and Secondary Schools, Inc.

10. It is the successor to the Middle States Association of Colleges and Secondary Schools, an unincorporated nonprofit association established in 1887 for the improvement and development of educational institutions, relationships and services. The institutions of higher education which participated in the founding of this Association were nonprofit, liberal arts institutions.

11. The purposes of Middle States, as stated in its Charter, are:

a. To take over, carry on, and continue the affairs, property, obligations, contracts, and activities of the unincorporated association known as the

Middle States Association of Colleges and Secondary Schools, and to pursue the general objectives of that association, to wit, to encourage the achievement of higher quality and to facilitate the development of better working relations among the higher institutions, secondary schools, and other educational agencies in the Middle States.

b. Without limiting the generality of the foregoing, the purposes of the corporation include:

1. To accredit institutions of higher education and of secondary education located within the Middle States area (the States of New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia as well as those located outside of the continental United States) as provided for in the bylaws of the corporation. It is understood that the process of evaluation and accreditation is itself intended to foster the development of a climate which will be a positive force in realizing the general purpose of the asssociation as stated above;

2. To initiate and sustain such research as may be consistent with the general purpose of the association; and

3. To provide an aegis under which representatives of secondary schools, institutions of higher education, and other educational organizations may meet in the discussion of educational problems and in the common pursuit of solutions to these problems.

12. A Middle States publication, Middle States Membership and Initial Accreditation, lists as Middle States' purposes, "to serve and protect the educational world and the public by establishing standards of quality and identifying institutions which achieve them" and "to stimulate and help each institution reach its maximum effectiveness."

13. The membership of Middle States consists primarily of institutions of higher education and secondary education which have been accredited by defendant. Membership is concomitant with accreditation. Institutions without accreditation are not admitted to membership. To be eligible for accreditation, an institution of higher education must have graduated at least one class and been in existence for at least two years.

14. Its membership of institutions of higher education includes 346 nonprofit institutions (universities, colleges, junior colleges and specialized institutions) in Delaware, Maryland, New Jersey, New York, Pennsylvania, District of Columbia, Puerto Rico and the Canal Zone. Of these, 106 are state or municipal universities, colleges or junior colleges, 83 are private non-sectarian institutions, 137 are private church related or controlled universities, seminaries or junior colleges, 15 are specialized institutions with concentrated courses of instruction in music, optometry, pharmacy and textiles, one is a special private institution for the deaf, three are federally sponsored military academies and one is a federally sponsored junior college.

15. Membership in Middle States is available to liberal arts colleges as opposed to vocational institutions of higher education. In these institutions, the emphasis is upon a liberal arts curriculum, while vocational education attempts to train the student for a specialized skill or business.

16. Middle States is one of six regional accreditation associations which accredit nonprofit liberal arts institutions.

17. It, as well as the five other regional associations, promulgates standards of quality or criteria of institutional excellence and accredits and admits to membership those institutions which it has found to meet its eligibility and evaluative standards. It seeks to determine in broad qualitative terms whether an institution has clearly defined appropriate objectives, whether it

has established conditions under which it can reasonably be expected to obtain them, and whether it appears to be attaining them and may be able to continue to do so. Under this criteria, Middle States, in its publication, The Nature of a Middle States Evaluation, notes that "Organization, administration, facilities, and resources are not important in themselves." Accreditation means that the institution has achieved quality within the context of its own aims and program--not that such institution is more qualified than any other accredited or unaccredited institution.

18. Middle States performs the accreditation function through its Commission on Institutions of Higher Education which has the following listed duties:

a. by accreditation, evaluation, consultation, and in all other appropriate ways, to promote in the Middle States territory the welfare and improvement of higher education with special emphasis on service to member institutions but without limitation to these colleges and universities.

b. to adopt from time to time lists of accredited institutions of higher learning in accordance with the standards accepted by this association.

c. to recommend to the association from time to time such changes in its standards for accreditation of institutions of higher education as may be desirable, especially such modifications as will keep the standards in harmony with fully accepted standards for institutions of higher education and promote constant growth of the educational usefulness of member institutions.

d. in accordance with association policy to cooperate in appropriate ways with similar commissions in other regional associations.

19. Evaluation is a process whereby the staff of the Higher Commission and a team of educators from member institutions consult with, advise, and assist an

applicant to evaluate its own educational goals and program (self-evaluation) and then have the program examined and reviewed by the team.

20. Accreditation occurs after the team has presented its report to the Higher Commission, which makes the final decision upon the applicant's request.

21. Middle States prepares, maintains and issues annually a list of member institutions. The list of member institutions of higher education is issued semi-annually by the Federation and published by the American Council on Education.

22. Together with the other five regional accrediting associations, Middle States is officially recognized by the United States Commissioner of Education as a reliable authority as to the quality of training offered by educational institutions within their geographical areas.

23. Middle States, as well as the five other regional accrediting associations, awards general accreditation for total institutions and does not separately accredit programs or departments within institutions. This latter form of accreditation is afforded by some 35 national accrediting agencies, which accredit specialized programs in teacher education, engineering, medicine, law, business administration, dentistry, and other specialized areas.

24. Regional accreditation is an integral part of higher education in the United States. Only Middle States furnishes regional accreditation in the District of Columbia area and thus the only manner which Webster can obtain certification of the quality of its institution which would be widely recognized by the public is through accreditation by Middle States.

25. From at least 1928, Middle States has specifically required that to be eligible for accreditation an institution of higher education must be nonprofit with a governing board representing the public interest. At no time in its existence has the Higher Commission of Middle

States evaluated or accredited a proprietary institution. Middle States has based its determination to exclude proprietary schools upon the theory that the profit motive is at odds with the educational process in that the proprietary institution does not devote its total resources to education and that such an institution could not have a disinterested governing board.

26. On or about March 2, 1964, the Commission on Institutions of Higher Education of Middle States, the Commission on Institutions of Higher Education of the New England Association of Colleges and Secondary Schools, Inc., the Commission on Colleges and Universities of the North Central Association of Colleges and Secondary Schools, Inc., the Commission on Higher Schools of the Northwest Association of Secondary and Higher Schools, the Commission on Colleges of the Southern Association of Colleges and Schools, Inc., and the Accrediting Commission for Senior Colleges and Universities and the Accrediting Commission for Junior Colleges of the Western Association of Schools and Colleges did create and establish the Federation of Regional Accrediting Commissions of Higher Education to represent and speak for the six accrediting agencies in matters of common interest, to establish policies and procedures, to exchange information, experience, and personnel, and to cooperate in various ways.

27. On or about March 4, 1964, the Federation issued a policy statement with regard to eligibility for accreditation by the regional associations.

28. This statement included the criterion that the institution "should be a nonprofit organization with a governing board representing the public interest." Defendant has refused to evaluate the merits of plaintiff's educational program for accreditation, basing its refusal upon this nonprofit criterion.

29. There was extensive correspondence between 1928 and the spring of 1966, concerning application for evaluation, accreditation and membership of Webster in

Middle States. Webster demanded the right to be examined for evaluation in the spring of 1966. This was rejected by Middle States and the suit followed.

30. As of the time of the institution of this action in June 1966, 28 secondary schools in the District of Columbia were accredited by the Secondary Commission of Middle States and two were candidates for such accreditation; 15 institutions of higher education in the District of Columbia were accredited by the Commission of Higher Education; and two such institutions held "Correspondent Status" with the Commission on Institutions of Higher Education.

31. During the period from January 1, 1964 to October 15, 1966, 13 secondary schools in the District of Columbia were visited by committees of the Commission on Secondary Schools of Middle States in connection with evaluation of such schools for accreditation or review of their accreditation. Each visit by a team or committee listed above was preceded by a visit by the Chairman of the team.

32. In addition to the visits to secondary schools in the District of Columbia by evaluating teams sent in by the Commission, the Chairman of the Commission of Secondary Schools and the Executive Secretary of this Commission visited the District of Columbia on four occasions between February and May of 1966.

33. This Executive Secretary also visited the District of Columbia in October 1966, to meet with the advisory committee of the District of Columbia.

34. As of the time of the institution of this suit, the Commission on Secondary Education distributed a newsletter approximately once a year to all member institutions in the District of Columbia.

35. Since 1927, the Commission on Secondary Schools, as a means of establishing local contacts and of facilitating the work of appraisal of institutions for accreditation, has utilized in an advisory capacity the

services, without compensation, of an Advisory Committee in the District of Columbia. The committee consists of representatives of independent private schools, public secondary schools, a representative of the D.C. Board of Education, and a representative of an institution of higher education. The Committee meets once or twice a year to review the reports of evaluation of secondary schools in the District of Columbia and makes recommendations to the full Commission regarding accreditation.

36. The Executive Secretary of the Commission on Institutions of Higher Education, in connection with evaluation for accreditation, visited institutions of higher education in the District of Columbia on four occasions in 1965 and on six occasions between January and May of 1966.

37. Six team members representing the Commission on Institutions of Higher Education visited Holy Cross College in the District of Columbia for an accreditation evaluation from March 1 to March 3 of 1964.

38. Seven team members visited Oblate College in the District of Columbia from March 20 to March 23 in 1966, shortly before the complaint was filed in this case.

39. Middle States collects membership dues once a year from its member institutions in the District of Columbia. It estimates that its total mail volume to the District of Columbia in any one year is 450 pieces of mail. This mail includes annual mailings of membership lists to member institutions, a higher commission newsletter distributed approximately three times a year, and material requested by individuals and institutions in anticipation of the annual convention.

40. It estimates that members of the Middle States' staff have placed approximately 275 telephone calls to persons in the District of Columbia between January 1, 1964 and October 15, 1966.

41. At the time this suit was filed, the President of Middle States was Rev. Charles Martin, Headmaster, St. Alban's National Cathedral School for Boys, Washington, D.C.

42. During 1966, he attended and arranged meetings of Middle States' officers, and corresponded and communicated with Middle States' officers and other persons concerning Middle States' affairs.

43. A meeting of Middle States' officers was held in the District of Columbia in February, 1966, at St. Alban's School, and was attended by five officers of Middle States and the Middle States' Administrative Secretary.

44. Between January, 1964 and October 15, 1966, officers of Middle States visited the District of Columbia on ten occasions.

45. Defendant is not licensed to do business in the District of Columbia, nor does it maintain an office or bank account therein.

46. Due solely to its proprietary status and not its lack of accreditation by defendant, plaintiff does not receive a descriptive listing in American Junior Colleges.

47. The Junior College Directory lists both accredited and non-accredited institutions which are nonprofit. The fact that Webster is proprietary, and not that it is unaccredited by defendant, is the reason for lack of inclusion of Webster in the Junior College Directory.

48. Some of the publications available for use by high school guidance counsellors include:

1. Chronicle Guidance Publications and View Deck, which fully lists Webster.

2. Lovejoy's College Guide, which fully lists Webster.

3. Barron's Guide to the Two-Year Institution, which fully lists Webster.

4. Cass and Birnbaum's Guide to American Colleges, which is limited to four-year institutions and therefore omits Webster.

49. Webster is also fully listed in the newly published Association of College Admissions Officers "Admissions Search Kit," which lists approximately 2,200 institutions of higher education throughout the United States.

50. Membership in the American Association of Junior Colleges (AAJC) is open to both regionally accredited and regionally unaccredited junior colleges. There are a total of 37 non-accredited junior colleges in the Middle States territory which are members of AAJC. AAJC requires an institution to have a nonprofit organization to be eligible. It is this requirement which renders Webster ineligible for membership in AAJC.

51. Plaintiff is eligible to, and does, use the services of the College Entrance Examination Board (CEEB). Plaintiff is listed in the CEEB "Bulletin of Information," with identifying number R5394, which number is used by a student when requesting that her CEEB scores be sent to Plaintiff. Plaintiff is not eligible for membership because of lack of regional accreditation. The "Bulletin of Information" is in the hands of high school students throughout the United States who take the CEEB examinations.

52. The number of applications for admission to Webster for the classes of 1964 through 1970 were as follows:

Class Year	*Applications Received*
1964	658
1965	568
1966	610
1967	814
1968	775
1969	719
1970	594

53. The number of applicants denied admission by Webster steadily increased from approximately 100 for the academic year 1960-1961 to approximately 200 in 1963-1964, which number of rejections has continued annually through 1965-1966.

54. The Middle States' Commission on Secondary Schools has accredited the Rhodes School since 1949, the Dwight School since 1928, and the Franklin School since 1928, all in New York City. These three schools are proprietary. With the exception of these three schools, no other proprietary schools are accredited by that Commission.

55. The Western Association of Schools and Colleges has accredited Armstrong College since 1963, Brooks Institute of Photography since 1963, and Woodbury College since 1961, all located in California. These three colleges are proprietary. With the exception of these three institutions, no other proprietary institutions of higher education are accredited by that Commission.

56. Webster has never been accredited by defendant nor its predecessor association.

57. Because Webster lacks regional accreditation, its graduates experience difficulty in transferring credits to senior institutions. At many senior institutions, transfer of credits is either impossible or is granted only on conditions of probation. As a result, Webster students' range of choice of senior institutions is limited.

58. Students of secondary schools who are choosing a college are, in some instances, advised by guidance counselors to avoid unaccredited schools, partly because of the problems which may be encountered in transferring credits.

59. The process of accreditation itself, is recognized to be a strong force for institutional development and improvement.

60. Educational excellence is determined not by the method of financing but by the quality of the program.

61. Both the Federal and state governments have utilized Middle States and other regional accrediting associations as agencies to identify institutions as worthy of benefits conferred by the government. The regional accrediting associations have operated as service agencies for the Federal government in determining eligibility for funding. Moreover, Middle States function as an agency to identify institutions of quality is not limited to its relationship with the Federal government. In states under its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans and state scholarships.

62. In recent years the Federal and state Governments have increased their financial outlays to higher education. The Federal government in particular has sharply increased its support. While many of these statutory programs limit grants to nonprofit institutions, the Higher Education Amendments of 1968 do allow participation by proprietary institutions of higher education in the College Work-Study and National Defense Student Loan programs (both basically assist the student rather than the institution). However, both programs require that the institution be accredited by a nationally recognized accrediting agency or association.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the defendant and of this cause of action under 28 U.S.C. § 1337 and Section 12 of the Clayton Act, 15 U.S.C. § 22, since defendant was transacting business in the District of Columbia at the time the suit was filed. The court has jurisdiction over the defendant with respect to count two under the provisions of D.C.Code § 11–521 and 28

U.S.C. § 1391. The court also has pendent jurisdiction of the defendant with respect to count two.

2. Acting in combination with its membership and in combination with the Federation, the defendant has unreasonably restrained the trade of plaintiff.

3. The defendant in performing its accreditation function is engaged in a quasi-governmental function, subjecting it to the restraints of the Constitution.

4. The refusal of the defendant to evaluate the plaintiff's educational program solely because of its corporate form is arbitrary, discriminatory and unreasonable.

5. Accreditation by the defendant association is necessary to the plaintiff if it is to successfully continue to operate as a junior college. Public policy requires that this power of the defendant must be exercised in a reasonable manner in the public interest. Exclusion of plaintiff solely because of its proprietary character is unreasonable and contrary to the public interest.

6. Unless enjoined by this court, defendant's conduct in refusing to consider plaintiff's application for accreditation will cause plaintiff to suffer irreparable injury.

7. Plaintiff is entitled to an injunction prohibiting the defendant from excluding plaintiff from accreditation because of its proprietary character and ordering defendant to accredit plaintiff if it shall otherwise qualify.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,351 September Term, 1969.

Marjorie Webster Junior College, Inc., a corporation

Appellee,

v. Civil 1515-66.

Middle States Association of Colleges and Secondary Schools, Inc., a corporation

Appellant.

Filed June 30, 1970

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Leventhal and MacKinnon, Circuit Judges.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof, it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed.

Per Curiam

For the Court:

NATHAN J. PAULSON, Clerk

By:

Hugh E. Kline
Chief Deputy Clerk

Dated: June 30, 1970
Opinion per Chief Judge Bazelon.

APPENDIX D

Title 29, Section 415 of the District of Columbia Code (1967 Ed.) provides:

> No institution heretofore or hereafter incorporated under the provisions of this chapter shall have the power to confer any degree in the District of Columbia or elsewhere, nor shall any institution incorporated outside of the District of Columbia or any person or persons individually or as a partnership or association or otherwise, undertaking to confer any degree, operate in the District of Columbia, unless under and by virtue of a license from the Board of Higher Education of the District of Columbia, which before granting any such license may require satisfactory evidence–
>
> 1. That in the case of an individual or any unincorporated group of individuals he, or a majority of them, or in the case of an incorporated institution, a majority of the trustees, directors, or managers of said institution are persons of good repute and qualified to conduct an institution of learning.
>
> 2. That any such degree shall be awarded only after such quantity and quality of work shall have been completed as are usually required by reputable institutions awarding the same degree: *Provided*, That if more than one-half the requirements for any degree are earned by correspondence, or extramural study, such fact shall be conspicuously noted upon the diploma conferred: *Provided further*, That no diploma shall be issued conferring a degree in medicine or any healing art,

or in dentistry, for study pursued or work done by correspondence.

3. That applicants for said degree possess the usual high-school qualifications at the time of their candidacy therefor.

4. That considering the number and character of the courses offered, the faculty is of reasonable number and properly qualified, and that the institution is possessed of suitable classroom, laboratory, and library equipment. (Mar. 3, 1901, ch. 854, § 586b, as added Mar. 2, 1929, 45 Stat. 1504, ch. 523; Nov. 7, 1966, 80 Stat. 1430, Pub. L. 89-791, title I, § 106.)

Title 31, Section 120 of the District of Columbia Code (1967 Ed.) provides:

The Board of Education shall be, and is hereby, authorized and empowered to accredit junior colleges operating within the District of Columbia: *Provided*, That the entrance requirements of such junior colleges be not less than high-school graduation, and the number of semester hours required for the title Associate in Arts or Associate in Science be not less than sixty, and the number and character of the courses offered and the number and qualifications of the faculty be reasonable, and the institution be possessed of suitable classroom, laboratory, and library equipment.

Accreditation by the Board of Education of the District of Columbia shall have the same force and effect as is usual in the case of accreditation by the various accrediting agencies of the several states of the Union. (July 2, 1940, 54 Stat. 729, ch. 523.)

Higher Education Amendments of 1968 (P.L. 90-575) (82 Stat. 1014) provides, in part:

PART C—AMENDMENTS TO COLLEGE WORK-STUDY PROGRAM

* * *

ELIGIBILITY OF PROPRIETARY INSTITUTIONS OF HIGHER EDUCATION

Sec. 139. Effective for fiscal years ending on or after June 30, 1970—

(1) Section 443(b) of the Higher Education Act of 1965 (as amended by this part) is amended by striking out "or" before "an area vocational school", and by inserting before the period at the end thereof the following: ", or a proprietary institution of higher education (as defined in section 461(b) of this Act)".

(2) Section 444(a)(1) of such Act (as amended by this part) is amended by inserting after "work for the institution itself" the following: "(except in the case of a proprietary institution of higher education)".

* * *

PART E—GENERAL PROVISIONS RELATING TO STUDENT ASSISTANCE

AMENDMENTS EFFECTIVE UPON ENACTMENT

Sec. 151 Title IV of the Higher Education Act of 1965[1] is amended by inserting after part D the following new part:

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[1] 20 U.S.C.A. § 1061 et seq.

"PART E—GENERAL PROVISIONS RELATING TO STUDENT ASSISTANCE PROGRAMS

"SUBPART 1—GENERAL PROVISIONS

"DEFINITIONS

"Sec. 461. (a) For purposes of this title, the term 'State' includes the Trust Territory of the Pacific Islands.

"(b) For purposes of part C of this title and title II of the National Defense Education Act of 1958, the term 'proprietary institution of higher education' means a school (1) which provides not less than a six-month program of training to prepare students for gainful employment in a recognized occupation, (2) which meets the requirements of section 801(a)(1) and 801(a)(2) of this Act, (3) which does not meet the requirement of section 801(a)(4) of this Act, (4) which is accredited by a nationally recognized accrediting agency or association approved by the Commissioner for this purpose, and (5) which has been in existence for at least two years. For purposes of this paragraph, the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of training offered.

* * *

PART F—AMENDMENTS TO NATIONAL DEFENSE STUDENT LOAN PROGRAM (TITLE II OF NATIONAL DEFENSE EDUCATION ACT OF 1958)

* * *

ELIGIBILITY OF PROPRIETARY INSTITUTIONS OF HIGHER EDUCATION

Sec. 174. (a) Section 103(b) of the National Defense Education Act of 1958[2] is amended—

(1) by striking out "and also includes," in the second sentence and inserting in lieu thereof "; any proprietary institution of higher education (as defined in section 461(b) of the Higher Education Act of 1965) which includes in its agreement under section 204 of such title such terms and conditions as the Commissioner determines to be necessary to insure that the availability of assistance to students at the school under such title has not, and will not, increase the tuition, fees, or other charges to such students; and"; and

(2) by inserting after "requirements of clause (5)" in the third sentence the following: "(but meets the requirements of clause (4))".

(b) Effective with respect to fiscal years ending on or after June 30, 1969, section 203 of such Act[3] is amended by adding at the end thereof the following new sentence: "The aggregate amount of Federal capital contributions paid for any fiscal year under this section to proprietary institutions of higher education (as defined in section 461(b) of the Higher Education Act of 1965) may not exceed the amount by which the funds appropriated pursuant to section 201 for such fiscal year exceed $190,000,000."

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[2] 20 U.S.C.A. § 403(b) (2nd, 3rd sentences).

[3] 20 U.S.C.A. § 423.

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IN THE

Supreme Court of the United States

October Term, 1970

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,

Petitioner,

—v.—

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Statutes Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States; Section 3 of the Sherman Antitrust Act, 15 U.S.C. § 3 (Petition, p. 3); provisions of the National Defense Education Act of 1958, the Higher Education Act of 1965 and the Higher Education Amendments of 1968, 20 U.S.C. §§ 401, 402, 435, 1201, 1085. (App., pp. A-1-A-2).

Questions Presented

Whether this Court should review the decision below where:

1. Petitioner has sustained no harm because it lacks accreditation by Respondent?
2. There are no decisions conflicting with the Court of Appeals' refusal to expand the scope of the Sherman Act to include evaluation and accreditation in the field of higher education and with that Court's placing upon Petitioner the burden of proving the unreasonableness of Respondent's standard?
3. That decision is based primarily upon common law principles of admission to private associations, a matter which does not involve a Federal question?

Statement of the Case

MARJORIE WEBSTER. Petitioner Marjorie Webster Junior College, Inc. (Webster) is a for-profit, business corporation in the District of Columbia. It is owned and controlled by the members of one family, who hold most of the administrative and corporate offices and who are its sole stockholders. Established in 1920 as a school of physical education and expression, Webster was incorporated in 1947. Accredited by the District of Columbia Board of Education for nearly 25 years, it has operated successfully as a junior college for women, offering two-year terminal and transfer courses in seven departments, without evaluation and accreditation by Respondent Middle States Association of Col-

leges and Secondary Schools, Inc. (Middle States). Out of 500 students enrolled in the 1966-67 academic year, only 90 or 18% were in the Liberal Arts department.

Webster is one of 35 proprietary institutions of higher education in the United States, which together enroll about 30,000 of the almost seven million students in the 2,500 American institutions of higher education. Webster is one of two proprietary institutions (out of a total of 26 institutions) in the District of Columbia. These two proprietary institutions have about 2,000 students, out of a total of 75,000 college and university students in the District. (J. A.[1] 1375 (44-45).

Middle States. Middle States is a voluntary, nonprofit, non-stock, educational corporation, incorporated on May 27, 1966, under the education laws of the State of New York. Through a predecessor organization, Middle States has been in existence since 1887. The U. S. Office of Education recognizes Middle States as a "non-governmental, voluntary accrediting" organization (DX 145A, App. p. A-4).

Through its Commission on Higher Education, Middle States evaluates and accredits nonprofit liberal arts institutions of higher education in the Middle Atlantic area. Through its own staff and the faculties of member institutions, Middle States provides a "body of experience . . . available to eligible institutions" (J. A. 869). Its membership consists of 346 nonprofit institutions of higher education and 1500 nonprofit institutions of secondary education

[1] J. A. refers to the Joint Appendix submitted to the Court of Appeals, filed in this Court by Respondent.

which have been accredited by Middle States. Membership is concomitant with accreditation.

ACCREDITATION. Accreditation means that evaluation by peer educators has found the institution to have achieved quality within the context of its own aims. In the words of the President of Manhattanville College, an evaluation does not "compare the institution being visited with any other institution like or unlike the one being visited, but only . . . [compares] what it says it is doing with what it seems to us, during our visit, is actually taking place" (J.A. 1001).

Accreditation does not mean that the institution is more qualified than any other accredited or unaccredited institution. Again, as stated by the Manhattanville President:

> "• • • There are accredited institutions at every level of the academic spectrum. The only point they have in common is that they have a single purpose which is to make the institution in question as strong academically as that institution can in view of its purpose." (J.A. 1017)

Since at least 1928, Middle States has limited its membership to nonprofit institutions with boards of trustees representing the public interest. In 1957 the Middle States' membership approved a continuation of this policy because, among other things, "there are certain elements so built into the structure of a proprietary institution as to mitigate against the excellence we seek for accreditation". The proprietary "institution is not devoting all of its resources to the welfare of its students and the upbuilding of its programs." (DX 152 at p. 37).

This standard was further implemented in 1964 when Middle States and five other regional accrediting associations formed the Federation of Regional Accrediting Commissions of Higher Education. Thus, Middle States' evaluation and accreditation process has developed solely with respect to the nonprofit, eleemosynary institution of higher education.

PROCEEDINGS BELOW. Between 1928 and 1966, Webster corresponded with Middle States concerning its eligibility for accreditation. In 1966, Webster instituted suit against Middle States in the United States District Court for the District of Columbia. After an extensive trial,[2] the District Court rendered judgment for Webster on July 23, 1969. The judgment was stayed by the Court of Appeals pending its decision, which was rendered on June 30, 1970. That Court reversed the judgment of the District Court, finding

> ". . . that the Sherman Act is not applicable to Middle States' conduct as indicated by the present record; that the circumstances are not such as to

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[2] Twenty-six witnesses testified for Middle States at the trial. These included the following expert witnesses: Dr. Arthur M. Blum, President, Point Park College; Dr. John S. Brubacher, Professor of Higher Education, Center for the Study of Higher Education, University of Michigan; Charles H. Burton, Esq., Partner, Ash, Bauersfeld and Burton; Dr. Glenn Christensen, President of Middle States and recently retired Provost and Vice President, Lehigh University, presently Professor of English; Calvin L. Crawford, Administrative Secretary, Middle States Association; Alfred D. Donovan, Vice President, Seton Hall University; Dr. John R. Everett, President, New School for Social Research; Dr. Jesse E. Hobson, President, Heald-Hobson Associates, educational consultants; John C. Hoy, Dean for Special Academic Affairs, Wesleyan University; Sister Elizabeth McCormack, President, Manhattanville College; Dr. Albert E. Meder, Jr., recently retired Vice-Provost, Dean of Rutgers University and recently retired Chairman of the Middle States Higher Commission; Martin D. Robbins, Associate, Heald-Hobson Associates; and Dr. John A. Stoops, Dean of the School of Education, Lehigh University.

warrant judicial interference with the accreditation and membership policies of Middle States; and that, assuming the Due Process Clause to be applicable, Marjorie Webster has not sustained its burden of showing the irrationality of the policy in question as applied to bar consideration of Marjorie Webster for accreditation." (Petition, p. A-3).

ARGUMENT

A. Webster Has Successfully Operated A Junior College Since 1947 Without Evaluation And Accreditation By Middle States.

The Court of Appeals held, and Webster concedes, that Webster "has operated successfully as a junior college since 1947" and that the record does not support "the conclusion that appellee will be unable to operate successfully as a junior college unless it is considered for accreditation by . . . [Middle States]" (Petition, pp. A-11, 23, fn. 24).[8] This conceded fact alone warrants denial of the petition.

ENROLLMENT AND APPLICATIONS. In the ten years ending in 1966-67, Webster's enrollment more than doubled to its present size of 500, which Webster has no intention of increasing (J.A. 1479 (58)). Indeed, in October 1965, just eight months before the suit was filed, a Webster Vice President reported to its Board that "[t]he college now had the largest student body in its history. The quality of its students was the highest it has ever been . . ." (DX 568; J.A. 1072).

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[8] The Court of Appeals took the District Court's findings of fact and the uncontested evidence in the record and reached the conclusion, contrary to the District Court, that Webster had not been harmed by lack of Middle States accreditation. Thus, F.R.C.P. Rule 52 is not applicable.

Prior to 1967, applications for Webster showed a steady increase (J.A. 1047; District Court's Finding of Fact (FF) 53, Petition, p. B-36). Since 1967 Webster has experienced, together with all other women's colleges in the District of Columbia, a decline in applications (J.A. 683, 740-792, 1025-1026). This is set forth in graph form on p. A-3.

All women's institutions in the District of Columbia, except Webster, are accredited by Middle States. Women's colleges generally have experienced increasing difficulty in student recruitment because of the rising cost of tuition and increased popularity of co-educational institutions (J.A. 686, 754-55, 792, 1028-29).[4] Special factors adversely affecting applications to women's colleges in the District of Columbia include the April 1968 riots, and wide national publicity given the crime situation here (J.A. 686, 755, 784, 791-92; 1029).

Transfer of Credits. Webster admitted in its 1968-69 catalogue that its graduates "have been accepted with advance standing in approximately two hundred universities throughout the country", double the number for the previous year (DX 999 at p. 26; DX 1001 at p. 25).

Only "twenty-five to thirty percent" of each class transfer, according to Webster (JA. 1046). Acceptance letters for students at Webster indicate whether or not the student is being accepted as a terminal or potential transfer student. Webster produced no substantial evidence at trial that

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[4] Even according to one of Plaintiff's experts, the Executive Director, Center for Educational Policy Research, Harvard University, "'the women's colleges are probably an anachronism'", "'the majority of women's colleges seem to be in special difficulty'", and "'they will grow much less rapidly than coeducational colleges and . . . exert a declining influence on coming generations'" (J.A. 69, 71).

students seeking transfer of credits earned at Webster were denied such transfer because of lack of Middle States' accreditation. Since 1962, only 34 of the approximately 1700 four-year institutions of higher education throughout the United States declined to give full academic credit to Webster students during that period. Only eleven of these institutions refused to accept Webster credits because of its lack of Middle States' accreditation (PX 47a, 47c, 47h, 47q).

Within the Middle States area, only eight four-year institutions—out of nearly 346 members of Middle States, and 500 institutions of higher education of all types in the area—refused to give full academic credit to Webster graduates. Only six such institutions attributed this rejection to Webster's lack of accreditation (J.A. 172, 512-20, 552-68, 522-29, 569-90; PX 47p).

Profitable Operations. Webster has suffered no tangible economic harm by its lack of accreditation. Indeed, the robust figure cut by Webster on its financial statements is not the image of a victim suffering irreparable harm from a conspiracy between the members of Middle States.

Webster's net operating income increased by 206.6% between 1961 and 1967. At least 25% of this increase was experienced since 1966. Webster probably is the only college in the United States distributing 10% bonuses to its faculty members (1967) and having a profit-sharing plan for them. (J.A. 1479 (52-55)). While nationally, total college and total administrative expenses rose 55% and 90%, respectively, between 1961 and 1967, Webster's net operating income tripled during the same period.

Webster's prosperity, of course, is understandable, since it is operated and administered for the economic benefit of the Webster family.[5] Except for an eight-month period in 1966-67, all of the directors, principal officers, and administrative officials at Webster have been members of the family, elected each year by each other. Over $110,000 in salaries is paid out each year to these five persons, and all but one other adult member of the family are also employed by Webster. (J.A. 1479(70)). The only non-family officer ever to serve at Webster—a former department head at American University—resigned as president in February 1967, after only eight months in office, in these words:

> "Today, after nearly eight months of unremitting efforts to discharge the responsibilities and duties of the Office of President of the College in accordance with the highest tradition of professional educators, I am still denied the full support of individual Members of the Board of Directors, including those Members who are also Officers of my Administration. Clearly, I have now no reasonable choice but to resign." (JA. 1479 (104)(3)).

Thirty percent of Webster's expenditures go to proprietary related items—expenditures which a nonprofit institution would not incur. (J.A. 1234; DX 215). This means that out of every dollar of tuition paid, only 70 cents is directed to educational expenditures.

And with regard to educational and general expenditures at Webster, 60.2% of expenditures are devoted to administration and general items. Only 28.3% is devoted to in-

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[5] Indeed, a shift to nonprofit status, according to a Webster Vice President and family member, "could endanger the future employment of the Webster family in the corporation" (J.A. 1479(59)).

struction, and only 0.4% to library. (DX 215). Included in the administrative and general item are the salaries paid the Webster family. The normal breakdown for educational and general expenses in both two-year and four-year colleges is 20-30% for administration, 45-55% for instruction, and 3-6% for library. (J.A. 1253).

Accreditation Status. Webster has been accredited as a junior college, and licensed to award the AA degree, by the District of Columbia Board of Education since 1947. It is therefore listed in Office of Education publications and major references used by high school guidance counsellors. Webster is excluded from certain publications solely because of its proprietary and two-year status and not because it is unaccredited by Middle States. (Petition, p. A-9, fn. 31).

Webster does not receive an alleged inferior symbol in an annual publication of the American Association of Collegiate Registrars and Admission Officers (AACRAO) due solely to its lack of Middle States' accreditation. The publication merely is an exchange of information whereby a university in a particular state or the District of Columbia indicates, by symbols, how it treats credits transferred to it by another local institution.

George Washington University gave Webster a "D" symbol until 1969, when a "C" symbol was indicated. According to that University's Director of Admissions, a witness for Plaintiff, the symbol for Webster was based on "experience" with Webster students and was not required or indicated by Middle States (J.A. 268-269, 284). In 1968 Webster was one of only fourteen institutions of higher education in the United States—and the only one in the District of Columbia—with a "D" symbol. Four hundred

and eighty-four institutions, without accreditation by Middle States or any other regional association, had the "A" or "B" symbols, the highest used by AACRAO (PX 44, DX 102).

Nor does the record support any claim of "stigma" attaching to Webster because of its lack of regional accreditation. In its complaint Webster maintained that "it has received the esteem and respect of educators throughout the United States." Asked the factual basis for this allegation, a Webster Vice President stated:

> "... [T]he acceptance of our students in transfer to some senior colleges throughout the country which means that these colleges have looked favorably upon us, or they wouldn't accept our transfer students." (J.A. 1479(62)).

Federal Funds. Webster suffers no harm from its lack of regional accreditation with respect to available Federal funds. Webster has never applied for Federal funds and admits that it does not need, desire, nor solicit "any funds ... from the federal government, the state government, local community or any religious group" (J.A. 183; 1470(61)).

Even if Webster did attempt to obtain Federal funds, it would be unsuccessful. In all cases in which Federal funds are available to institutions, they are restricted by statute to nonprofit institutions. Thus, a profit-making institution of higher education cannot, as an institution, be eligible to receive Federal funds.

Webster does have a "three-letter certification" at the Office of Education, a statutory alternative to accreditation which can qualify an institution for Federal funding

(App. p. A-2). In addition, many programs state that, in the absence of a nationally recognized accrediting agency which is qualified to accredit a particular class of institutions, the Commissioner of Education shall appoint an Advisory Committee to establish standards pending the establishment of a qualified accrediting agency. See, for example, Higher Education Amendments of 1968, § 435(b) (App. p. A-2).

Only two programs out of the extensive Federal assistance to higher education indirectly involve proprietary institutions—the college work-study program and the National Defense Student loan program. Higher Education Amendments of 1968, § 461(b) (Petition, p. D-4). These programs provide financial assistance to the students attending the institution and not to the institution, which itself is required to provide certain matching funds to eligible students. In 1968, some proprietary institutions—schools which provide at least a six month's program to prepare students for gainful employment in a recognized occupation—became eligible to participate in these two programs. Webster has not sought to participate in these programs, and has disclaimed any interest in them.

The lack of any demonstrable monetary or other damage to Webster alone warrants denial of certiorari. A private antitrust plaintiff must prove the fact of damage as a prerequisite to maintaining the cause of action. Cf. *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (affirming jury verdict where "there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage, and the measure of

proof necessary to enable the jury to fix it."). Not even "mainly circumstantial" evidence as to harm to Webster appears on the record of this case. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379. No causal relationship was established by Webster on the record between any Middle States' action and any alleged monetary damage or other type of injury to Webster. *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 272 F. Supp. 744, 749 (D. Mass. 1967), *aff'd*, 390 F.2d 113 (1st Cir. 1968), *cert. denied*, 391 U.S. 914.

B. No Decisional Conflict Exists as to the Inapplicability of the Sherman Act to the Evaluation and Accreditation of Institutions of Higher Education.

The Court of Appeals held that the Sherman Act was inapplicable to the facts of this case. (Petition, pp. A-3-A-6). That holding does not conflict with decisions of this Court and with the decisions of other lower courts.

The purpose of the Sherman Act was to proscribe conspiracies and combinations having commercial objectives and it was not intended to apply to the noncommercial aspects of higher education including the liberal arts and the learned professions. (Petition, p. A-5). Prior to passage of the Sherman Act, Justice Story in *The Schooner Nymph* (C.C.) 1 Sumn., 516, 18 Fed. Cas. 935 (No. 10388, 1834) defined the meaning of the word "trade":

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned*

professions, it is constantly called a trade." (Emphasis added).[6]

This Court has adopted Justice Story's definition of "trade" as that word is used in Section 3 of the Sherman Act. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435-436; *United States* v. *National Association of Real Estates Boards*, 339 U.S. 485, 492. The Court there stated that "activity", to be actionable under the Sherman Act, must be essentially commercial in nature.

No such commercial activity is involved in the evaluation and accreditation functions of Middle States. These functions support and enhance the educational efforts of institutions of higher education,[7] traditionally eleemosynary institutions in the history of the common law. *The Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 562 (1819) (argument of Daniel Webster); *U. S. ex rel. Chicago Business College* v. *Payne*, 20 App. D.C. 606, 613 (1902) ("established solely for the public good and not for private gain"); *Cornell University* v. *Messing Bakeries*,

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[6] The District Court incorrectly stated that Middle States was claiming inapplicability of the antitrust laws under the "learned professions" category of the *Nymph* decision. (Petition, p. B-11). The applicable category is "liberal arts". See O'Neill, *The Liability of Private Accrediting Associations under the Sherman Act, the Constitution, and the Common Law*, 11 B. C. Ind. & Com. L. Rev. 285, 295 (1970).

[7] "Just as the distinctive thing about man, which separates him from other gregarious animals, is his capacity for reasoned thought, so the university's basic commitment to thought distinguishes it essentially from most other institutions. It does not seek victories; it does not work for profits; its production is not measurable. Its truest goals are not precise targets, but high ideals—the enrichment of the minds and lives of its students, the advancement of knowledge, the increase of understanding among men, and the unending search for truth." Cohen, *The Human Nature of a University*, UNIVERSITY: A PRINCETON QUARTERLY, No. 42, Fall, 1969 at 4.

138 N.Y.S. 2d 260, 262 (App. Div. 1955), *aff'd*, 309 N.Y. 722, 128 N.E. 2d 421 (1955) (injunction granted to prevent bakery from using University's name; "Equity may also shield the thrust of business into the kind of legal rights acquired in areas entirely removed from commercial activities"); *Beard* v. *Board of Education*, 81 Utah 51, 16 P. 2d 900, 910 (1932) (extracurricular activities of school "a proper and necessary part of our educational system, and hence cannot be considered as carried on for commercial purposes"); *cf. Marston* v. *Ann Arbor Property Managers Ass'n.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd.*, 422 F. 2d 836 (6th Cir. 1970). A university is "a community of scholars" where "[t]he readings of the market place are not invariably apt in this noncommercial context." *Greene* v. *Howard University*, 412 F. 2d 1128, 1135 (D.C. Cir. 1969).

This Court consistently has limited the reach of the Sherman Act to those practices which have commercial business aims. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 52; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-493; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, fn. 7. When no commercial purpose is involved, this Court has refused to sanction application of the Sherman Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. The Court there stated:

> "The proscriptions of the Act, *tailored as they are for the business world*, are not at all appropriate for application in the political arena." 365 U.S. at 141 (Emphasis added).

The Court of Appeals thus properly held that, since Middle States' "objectives . . . are not commercial",

> ". . . an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of

> the profession, is not sufficient to warrant application of the antitrust laws." (Petition, p. A-5.)

The Court of Appeals' decision conflicts with neither the decisions of this Court nor those of any other Circuit. No conflict exists with *American Medical Association* v. *United States*, 317 U.S. 519. That case involved a dramatically repressive combination motivated by the commercial desire of physicians to protect and enhance their livelihood, at the expense of physicians not members of the Medical Society of the District of Columbia. The record showed that the Society became alarmed at competition by a co-operative membership corporation furnishing medical services at cheaper prices; steps were taken by the Society and the American Medical Association (AMA), including a boycott effected by use of a "white list"; threats of disciplinary action were made against doctors working for the co-operative association; and such doctors were excluded from medical and hospital facilities. 317 US at 532.

AMA, the Medical Society, and other defendants were indicted and convicted for conspiracy in restraint of trade in the District of Columbia, in violation of Section 3 of the Sherman Act.[8] This Court sustained the convictions. It specifically refused to pass on the issue of whether the practice of medicine constituted "trade":

> "Much argument has been addressed to the question whether a physician's practice of his profession

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[8] First, the District Court sustained a demurrer to the indictment, *United States* v. *American Medical Ass'n.*, 28 F. Supp. 752 (D.D.C. 1939), which was reversed on appeal. 110 F. 2d 703 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644. On remand, the defendants were convicted, and this was affirmed on appeal. 130 F. 2d 233 (D.C. Cir. 1942), *aff'd.*, 317 U.S. 519.

> constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid down in the indictment, we need not consider or decide this question." 317 U.S. at 528.

The Court held, as the Court of Appeals here has noted (Petition, p. A-5, fn. 18):

> "Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the *Apex* case places it within the scope of the statute." 317 U.S. at 528-29.

In the *AMA* case, there was no question of the defendants' aim and purpose deliberately to destroy GHA in order to financially protect themselves. The case clearly limits the application of the Sherman Act to the business-like aspects of medical practice.[9] THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 63, fn. 232 (1955); Note, *The Medical Profession and the Sherman Act*, 8 GEO. WASH. L. REV. 1034, 1044-45 (1940).

The instant case is not concerned with the "business-like aspects" of higher education. Webster concedes that the nonprofit criterion does not grow out of economic or businesslike considerations. (Petition, p. A-5). Absent commercial motives, the traditional exclusion of higher education from trade retains its full integrity. The *AMA* case is not in conflict.

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[9] The two Court of Appeals opinions in *AMA* rests on the applicability of common law restraint of trade concepts to the practice of medicine. There is no common law precedent for applying restraint of trade concepts to higher education. Indeed, the contrary is true. *The Schooner Nymph* (C.C.) 1 Summ. 516, 18 Fed. Cas. 506 (No. 10388, 1834).

Nor is there conflict with *Council of Defense of State of New Mexico* v. *International Magazine Co.*, 267 Fed. 390 (8th Cir. 1920). In that case, the New Mexico Council of Defense, established during World War I, campaigned to bar the Hearst publications from sale in New Mexico because of its objection to William Randolph Hearst's views on the war. The Council specifically coerced newsdealers to break their contracts with Hearst and to refrain otherwise from selling Hearst newspapers and magazines. The Court held that the Council's acts "amounted to a conspiracy to boycott or blacklist the magazines published by complainant," and therefore were in violation of the Sherman Act. 267 Fed. at 412. The defendants' "declared and obvious purpose was to destroy complainant's business in New Mexico." *Id.* at 411. This factual situation in no way bears any resemblance to the facts of the instant case.

Other cases which Webster cites to establish that the Sherman Act applies where there is a non-commercial purpose involve factual situations where the intent and purpose to restrain commerce clearly was established on the record. In *United States* v. *Gold*, 115 F. 2d 236 (2d Cir. 1940), the defendant union, in an attempt to unionize the fur garment industry, picketed non-union dresser and dyer plants, attempted to persuade manufacturers not to deal with them, and ordered its own members not to handle any goods from the non-union plants. Defendants were convicted of a conspiracy to restrain trade in violation of the Sherman Act, Citing *Apex, supra*, the Court of Appeals reversed the convictions because no effect of the restraint on the market conditions in New York had been shown. 115 F. 2d at 238.

Fashion Originators Guild of America v. *Federal Trade Commission*, 114 F. 2d 80 (2d Cir. 1940), *aff'd.* 312 U.S. 457,

was an attempt by the Guild to eliminate competition from copiers of original fashions. This was done by placing the names of retailers who sold copies on red cards and the names of retailers who refused to sell copies on white cards. Both sets of cards were distributed to the manufacturers. The obvious reason for the distribution of the cards was to prevent the manufacturers from selling original fashions to any "red card" retailer. This Court held that:

> "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." 312 U.S. at 467-68.

In *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941), General Motors, through its financing subsidiary GMAC, entered into a conspiracy to monopolize and control the financing of new and used General Motors cars. GM dealers were coerced into financing through GMAC to the exclusion of 375 independent finance companies. If various types of pressures brought by GM had not convinced the dealer that he should use GMAC, the dealer's GM franchise would be terminated. The Court held that "[i]t is clear that the evidence in this case tends to show a conspiracy having as its purpose the control by appellants of the dealers' financing." 121 F. 2d at 397.

The decisions of this Court cited by Webster do not conflict with the Court of Appeals' holding below. *United States* v. *Griffith*, 334 U.S. 100 bears no relationship whatsoever to this case. The defendants there operated moving picture theatres in a three-state area. They entered into master

agreements with film distributors which effectively reduced the ability of defendants' competitors to obtain desirable films. This Court premised its finding of a Sherman Act violation on the grounds that Section 2 is aimed, *inter alia*, at the acquisition of "effective market control" which included "the existence of power 'to exclude competition when it is desired to do so.'" 334 U.S. at 107.

In *United States* v. *Patten*, 226 U.S. 525, the defendants were prosecuted under the Sherman Act for conspiracy to control the cotton market on the New York Cotton Exchange. The defendants were "cornering the market" by purchasing excess quantities of cotton futures, withholding them from sale and therefore driving up the prices paid by cotton manufacturers. The purpose of the conspiracy ". . . was to reach and to bring within its dominating influence the entire cotton trade of the country." 226 U.S. at 543.

The defendants in *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, were film distributors who controlled 60% of all films available for exhibition. Defendants required all exhibitors to enter into a standard contract which provided for compulsory arbitration of any disputes and penalties for failure to submit to arbitration. The arbitration board consisted of 3 members from the local film board of trade (controlled by the distributors) and 3 proprietors or managers of theatres in the region. The Court held that this arrangement violated the Sherman Act, noting:

> " . . . when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal." 282 U.S. at 43.

Finally, in *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, the defendants entered into agreements which were tied to patent licenses to restrict the competitive sale of enameled ironware. The agreements provided for standard prices, rebates on royalties, and prohibited the sale of defective pieces. A committee was established to fix prices and to pass upon any infractions of the agreements. The Court held that the agreements which practically controlled the trade of enameled ironware "from producer to consumer" violated the Sherman Act. 226 U.S. at 48.

C. Middle States' Nonprofit Standard is Reasonable.[10]

Middle States' Higher Commission has been engaged in the evaluation and accreditation of institutions of higher education since 1921. In the early years of its accrediting activity, the Higher Commission applied quantitative standards against which the applicant institution was measured. Easily identifiable factors, such as the degrees held by the faculty and the number of books in the library, predominated in this early form of evaluation.

This quantitative approach to accreditation was found to be unsatisfactory. The results of such quantitative measurements often had little relationship to the actual quality of the institution. (JA. 1111).

In 1946 this experience of the Higher Commission resulted in "Characteristics of Excellence"—a document incorporating a new approach to evaluation and accredita-

[10] The evidentiary value of the alleged "recent study by the United States Office of Education . . . [indicating] that there is no empirical data or research to support the proprietary exclusion" (Petition, p. 7) can be judged by the full transcript dealing with the "study", which shows its genesis by Webster's counsel, secrecy, and lack of any substance whatsoever. (J.A. 385-388).

tion. (J.A. 1414; DX 148). Qualitative standards replaced quantitative standards. The applicant institution today is no longer measured against quantitative minimums. Rather, it is measured in terms of its own goals and resources. The institutions are expected to define their educational goals, utilizing their full resources to that end. This establishes the frame of reference within which they are measured.

In evaluating and considering an institution for accreditation, Middle States does not compare one institution with another (J.A. 873; 1016-17; 1374(30)). Regional accreditation is not a certification that the academic quality of an institution has reached a certain level. (J.A. 1016-17). Accreditation by Middle States assures to the public and to the academic community that within the accredited institution there exists an administration and faculty devoted to the specific commitments of their institution and that the institution devotes all of its resources to educational goals. (J.A. 1374 (29-30)).

Organizational factors vitally affect higher education. (J.A. 1120; 991). The Higher Commission concluded 40 years ago that the commercial pattern of organization was not conducive to the best kind of work in higher education. (J.A. 1420). The evaluative process subsequently developed by Middle States presupposes the presence of nonprofit or public status, a board of trustees representing the public interest, and devotion of all of the resources of the institution to education. (J.A. 980).

The primary function of a Board of Trustees in a nonprofit college or university is to establish an environment conducive to learning. (J.A. 1354). The Board of Trustees must see that the total financial resources of the institution are used for academic endeavor. (J.A. 984). The Board is

charged with representing and holding in trust the public interest. (J.A. 986). Its members serve without compensation, and usually contribute to and assist in raising funds for the institution. (J.A. 1357; 997). Self-aggrandizement of trustees at the expense of the college or university is unconscionable. (J.A. 1427).

Profit-making corporations engaged in higher education cannot be evaluated with the standards developed by Middle States because they have a double goal—education and profit-making. (JA. 1006, 1355). What is economically efficient is not necessarily educationally efficacious. Indeed, the two goals may be at cross purposes. (JA. 1291). The proprietary institution has a conflict of interest by its very organization and operation. (JA. 1421; 1374(28); 1112-13). "If a person is thinking on the one hand of profits, thinking on the other hand of educational policy, and you mix these two, how can you ever be sure that you are getting an opinion which is wholeheartedly, completely disinterested on behalf of the public? I don't think you can be sure of that." (JA. 1118 Brubacher).[11]

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[11] The Middle States criterion has a valid historical basis as well. Commenting upon a statement by a witness for Plaintiff that "proprietary institutions may indeed be presumed to have those conditions more conducive to institutions of integrity, institutional independence, and institutional unity than the colleges and universities, non-profit though they may be, which are dependent upon their flow of funds from public taxing bodies" (J.A. 1118), Dr. John S. Brubacher, former Professor of Higher Education at the University of Michigan and an expert on the history of American education stated: " . . . [M]y own opinion, looking at it in terms of historical background, I just don't know that this sort of thing happens. As a matter of fact, the great majority of our institutions have felt that the public interest is best served by a non-profit board of . . . [trustees] and so it seems that history tends to contradict his rather suppositional statement." (J.A. 1119).

"The nonprofit tradition in higher education has a substantial history, which goes back into the Hellenistic times . . ." (J.A. 1374(13)); (Dr. John Stoops, Dean, School of Education, Lehigh University).

The essential goal of a profit-making corporation is to return profit on invested capital. Profit is the corporation's primary responsibility. Each decision is, and must be, made in terms of the most profitable alternatives for the stockholders. (JA. 1279, 1357). Thus, as stated by the President of the New School of Social Research:

> *"If they* [the two goals of profit and education] *are both in the same institution, it is quite obvious that a question of a return on capital must be the first and primary consideration because if the capital leaves the institution, the institution no longer exists for whatever secondary and tertiary function it may try to provide and so that a primary profit motive, which all profit organizations must necessarily have to survive, would seem to be to make the educational goal or the educational motive secondary."* (J.A. 1355) (Emphasis added).

The evaluative criteria developed by Middle States are not suitable to the evaluation and accreditation of profit-making corporations engaged in higher education. The Middle States approach becomes irrelevant where a critical component of the goal of an institution is not educational, but rather personal gain for the owners.[12] (J.A. 118; 1130-32; 1136; 1139; 1644). As stated by the former Provost of

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[12] Three proprietary secondary schools, among the "oldest on the [accredited] list," remain on the Middle States membership list as "grandfathers" out of considerations of fairness. (J.A. 472). The three proprietary institutions of higher education in the Western Association are all that remain of a group of "highly specialized" institutions which "were not organized according to the normal pattern of a liberal arts colleges," specializing in such subjects as music and photography but with a liberal arts foundation. In 1965 these three were added as "grandfathers" to the Western Association's regular membership. (J.A. 481-483, 486). Since the institution of this suit in 1966, two of the three schools have become nonprofit.

Lehigh University, an experienced member of evaluation teams,

> "... [T]his basic difference between the two kinds of institutions, proprietary and non-proprietary is so fundamental and so critical that the institutions cannot be considered together. They cannot be evaluated by the same instruments. A proprietary institution could not be evaluated appropriately and adequately, using the documents which Middle States has developed for its current eligible membership or applicants. [I]t could not use on an evaluating team the men who have built their experience ... in evaluation by evaluating non-profit institutions. The difference between the two is so great that ... [a] wholly different set of instruments and standards would have to be devised for the evaluation of proprietary institutions ..." (J.A. 880-881)

To abandon the nonprofit criterion would require "a whole new instrument of evaluation and [development of] a whole new set of evaluators" (J.A. 903). The President of Manhattanville College, also an experienced evaluator, "would not know how to evaluate a proprietary institution" (J.A. 1005).

A complete new set of criteria would have to be developed in order properly to evaluate and accredit a profit-making corporation engaged in higher education. To do so would drastically change the whole direction of Middle States accreditation.[18]

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[18] Indeed, such a change would make Middle States a "public utilities organization", since part of the evaluation would require a subjective decision as to whether 50-60-70-80-90% of the resources being devoted to education—not 100% as in the case of the nonprofit institution—was adequate to serve the aims of the institution and the needs of the students (J.A. 1646). This witness, an experienced

D. The Court Below Applied District of Columbia Common Law Which Does Not Conflict With Other Decisions Or Present An Important Federal Question.

The principal ground upon which the Court of Appeals denied relief to Webster was its determination, under the evolving judicial standards of admission to private associations, that Middle States' nonprofit criterion is a reasonable one. After finding that Webster can operate successfully as a junior college without Middle States' accreditation, the Court then examined Middle States' objectives and held that, given these objectives, Middle States' restriction of membership to nonprofit institutions is a reasonable means of achieving these ends. (Petition, p. A-11).

The Court of Appeals' opinion is based upon its application of common law principles to the facts of this case. Judicial scrutiny of private associations' admission policies is a matter which must be determined on the basis of state or local law or, in this case, the local law in the District of Columbia. No interpretation of the Federal Constitution or a Federal statute is involved. There is no Federal question which needs to be resolved by this Court.

No conflict of authority exists between the Court of Appeals' decision and those of other jurisdictions.

This case does not present the situation in *Falcone* v. *Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791, 799 (1961), where the medical society involved possessed

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evaluator for Middle States and a Vice President of Seton Hall University, N. J., stated that, if Middle States were forced to evaluate proprietary institutions, "the fundamental purposes, what Middle States calls itself, . . . would have to be changed and disregarded" (J.A. 1634-35).

"a virtual monopoly over the use of local hospital facilities," as the result of which, it could, by denying membership, "preclude . . . [Dr. Falcone] from successfully continuing in his practice of obstetrics and surgery." The same is true of *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1945), which involved the deprivation of plaintiff's livelihood by "a closed union coupled with a closed shop," the "fundamental question" being whether such a situation was "a legitimate objective of organized labor." And in *Pinsker* v. *Pacific Coast Soc'ty of Orthodontists*, 75 Cal. Reptr. 712 (Cal. App. 1969), *reversed*, 81 Cal. Rptr. 623, 460 P.2d 495, 497 (S. Ct. 1969), the exclusion of plaintiff, a fully qualified dentist, was based upon an "off the record" reason involving the fact that plaintiff was practising with a nonmember dentist, the termination of which relationship would mean that "your application might be favorably reconsidered."

None of these decisions is inconsistent with that of the Court of Appeals below.

E. Webster Has Established No Infringement Of Constitutional Rights.

In order to apply due process restraints to Middle States, Webster must show that Middle States' activities are "state action". *E.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 506. Webster then must show that the nonprofit standard was unreasonable state action as applied to it. The Court of Appeals below held that, even assuming Middle States' activities are such "state action", Webster had failed to prove that the standard was unreasonable and therefore no violation of

due process had occurred.[14] Indeed, that Court held, and Webster has not challenged, that the standard is a reasonable means used by Middle States to carry out its underlying objectives—to improve higher education. (Petition, p. A.-13). Further, due process was not denied by unconstitutional internal procedures (*Id.* at p. A-8, fn. 28). Thus, Middle States has acted within the bounds of its allowable

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[14] The Court of Appeals assumed, without deciding, that Middle States' activities are "state action" subject to the Fifth Amendment. (Petition, p. A-14). That issue is not now before this Court on the Petition. However, Middle States submits that its activities do not, in any sense, constitute "state action". As the U.S. Office of Education recognizes, Middle States is a "non-governmental voluntary" organization (DX 145A, App. p. A-3). Federal and State contribution of funds and property, the alleged impression of higher education with the public interest, and any incidental effect upon the status of Webster arising from the unavailability of federal funds, by statutory provision, because it is proprietary do not make Middle States' evaluation and accreditation "state action". There is no State involvement "with the activity that caused the injury". *Powe* v. *Miles*, 407 F. 2d 73, 81 (2d Cir. 1968) (Alfred University's involvement with New York State insufficient to make university's actions those of state); *Counts* v. *Voorhees College*, 312 F. Supp. 598, 607 (D.S.C. 1970) (no State action involved where university disciplined students); *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535, 548-549 (S.D.N.Y. 1968) (Columbia University action in disciplining students not state action); *Parsons College, Inc.* v. *North Central Association*, 271 F. Supp. 65, 70 (N.D. Ill. 1967) (withdrawal of accreditation by Association not State action and not unreasonable in itself); *Salter* v. *New York State Psychological Ass'n*, 14 N.Y. 2d 100, 198 N.E. 2d 250, 253 (1964) ("Co-operation and leadership, advice and reliance on advice—these are shown, but not shown is delegation by an agency of the State"): see *Browns* v. *Mitchell*, 409 F. 2d 593, 596 (10th Cir. 1969) (no State involvement with University of Denver disciplinary action because of tax exemption).

discretion, particularly in view of its long experience in evaluation and accreditation matters (*Id.* at p. A-14).[15]

This disposition by the Court of Appeals is certainly in accordance with the decisions of this Court. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 596 (where municipal ordinance which prohibited mining excavation below the water table, was challenged by defendant mining operation as violation of due process, it was held that defendant did not sustain the burden of showing that the ordinance was unreasonable as it affected the defendant); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 ("All [exercises by the states of their police power] are entitled to the same presumption of validity when challenged under the Due Process Clause of the Fourteenth Amendment."); *Salsburg* v. *Maryland*, 346 U.S. 545, 553 ("The presumption of reasonableness is with the State."); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 ("But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."). There is no conflict here which needs to be resolved by the Court.

Webster's First Amendment argument is a matter which is not in issue before this Court. No one has denied Webster the right to operate a proprietary school in the District of Columbia. Middle States does not license Webster. The

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[15] Petitioner's Equal Protection argument, which it never really formulated or pressed in the Courts below, can be disposed of on the same grounds. A violation of the Equal Protection Clause requires an "invidious discrimination". *Ferguson* v. *Skrupa*, 372 U.S. 726, 732. Since the distinction made by Middle States between profit making institutions and nonprofit institutions was held by the Court to be a reasonable classification, there could, therefore, be no invidious discrimination against Petitioner.

Court of Appeals specifically held that Middle States had not infringed upon Webster's right to operate a proprietary junior college. (Petition, p. A-9-A-11).

Even if this were in issue, the right to operate a proprietary educational institution is not one protected by the First Amendment. That amendment protects "freedom to advocate ideas," particularly where the State licensing authority may impose a prior restraint. Cf. *Kinsley Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684, 688. The constitutional restraint does not guarantee the right to make money, where freedom of speech may be incidentally—if at all—involved. *Valentine* v. *Christensen*, 316 U.S. 51, 54-55 (licensing valid where merchant printed advertising on one side of sheet and claimed First Amendment protection because of the expression of ideas on the other side); *In Re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 713 (S. Ct. 1946) ("freedom of speech . . . includes, in the main . . . freedom of expressions of political, sociological, religious and economic subjects, not commercial activities to which speech is only an incident or means"). Compare *Jackson* v. *Darrier*, 424 F. 2d 213, 217-218 (6th Cir. 1970), *cert. denied*, 39 U.S. LAW WEEK 3149 (school regulation against long hair upheld as to student who claimed such hair needed in order to play in rock band; "we agree . . . that 'the growing of hair for purely commercial purposes is not protected by the First Amendment's guarantee of freedom of speech' ").

CONCLUSION

The Petition for Certiorari raises no issue of sufficient importance to justify consideration by this Court, points to no conflict of decisions, and shows no error in the Court below. The Petition should be denied.

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October 26, 1970

APPENDIX

STATUTES

NATIONAL DEFENSE EDUCATION ACT OF 1958, HIGHER EDUCATION ACT OF 1965 AND HIGHER EDUCATION AMENDMENTS OF 1968:

20 U.S.C.:

§ 401.

The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education.

§ 402.

Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system.

§ 1201.

(j) The term "combination of institutions of higher education" means a group of institutions of higher education that have entered into a cooperative arrangement for the purpose of carrying out a common objective, or a public or private nonprofit agency, organization, or institution designated or created by a group of institutions of higher education for the purpose of carrying out a common objective on their behalf.

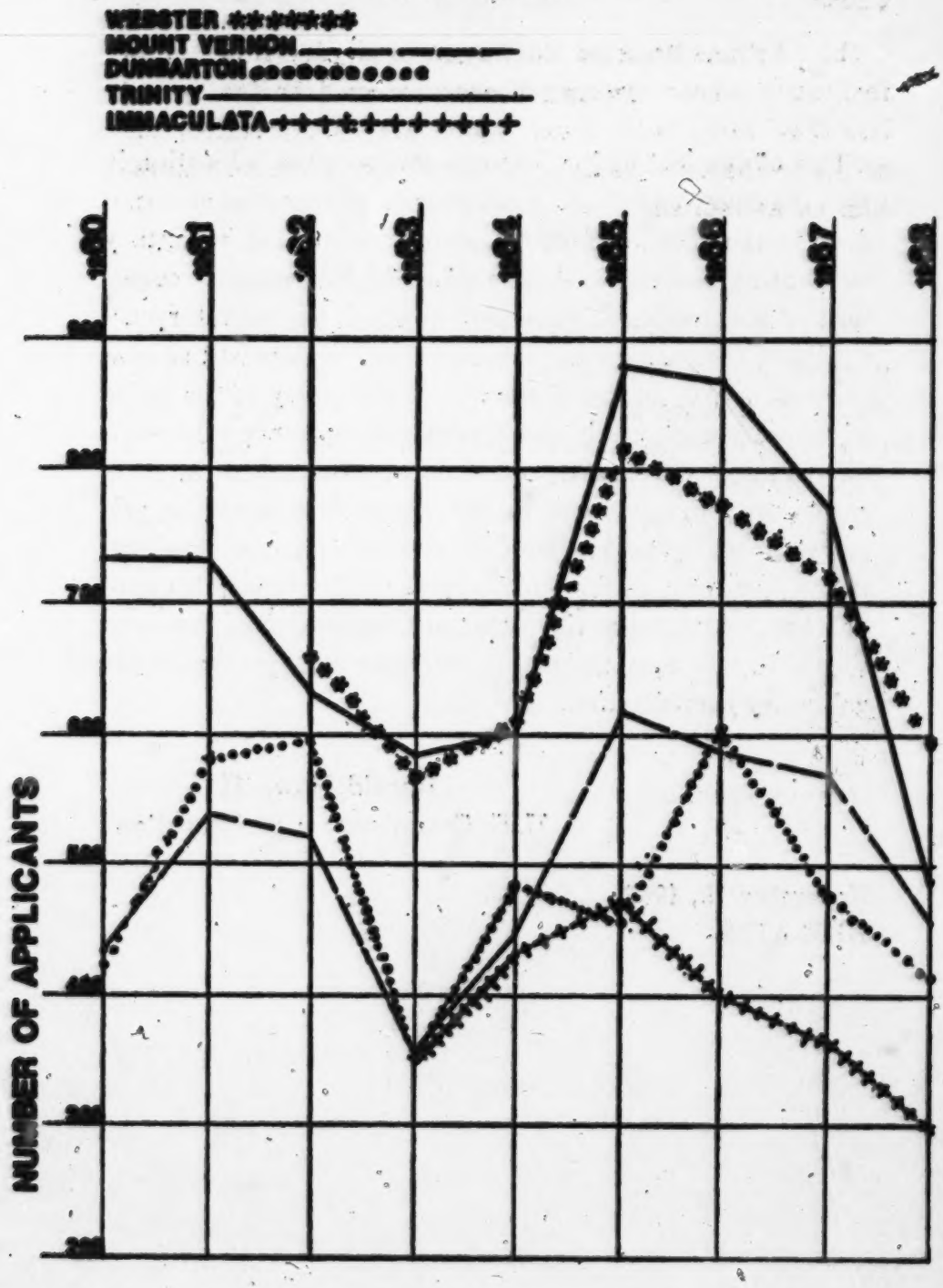
§ 1085.

(b) [An unaccredited institution is eligible if it] is an institution whose credits are accepted on transfer by *not less than three institutions* which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

• • • • •

If the Commissioner determines that a particular category of such schools does not meet the requirements of clause (5) because there is no nationally recognized accrediting agency or association qualified to accredit schools in such category, he shall, pending the establishment of such an accrediting agency or association, appoint an advisory committee, composed of persons specially qualified to evaluate training provided by schools in such category, which shall (i) prescribe the standards of content, scope and quality which must be met in order to qualify schools in such category to participate in the program pursuant to this part, and (ii) determine whether particular schools not meeting the requirements of clause (5) meet those standards.

The following graph shows applications to women's colleges in the District of Columbia:



U. S. Office of Education
Policy Statement

The Role of Voluntary Accreditation In the United States

One of the distinctive features of American education is that the development and maintenance of educational standards is the responsibility of non-governmental, voluntary accrediting associations. The Office of Education is cognizant of the invaluable contribution which the voluntary accrediting associations have made to the development of educational quality in the Nation. It is the policy of the Office of Education generally to support and encourage the various recognized voluntary accrediting associations in their respective activities, and to endorse their role as the primary agents in the development and maintenance of educational standards in the United States. The Office also supports and encourages the National Commission on Accrediting in its role as a national coordinator and spokesman for voluntary accreditation.

Harold Howe II
U. S. Commissioner of Education

November 19, 1968
BHE-AIES

IN THE

Supreme Court of the United States

October Term, 1970

No. 751

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
Petitioner,

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Webster submits this reply to respondent Middle States' brief in opposition in order to clarify the issues in this case and to correct misstatements in respondent's brief which might mislead this Court. Petitioner will not respond to each argument in the opposition, seeking to confine this reply to only the more

critical errors in respondent's brief. These errors will be considered in the order in which they appear in the brief.

A. Injury to Webster

Middle States contends that the petition should be denied because "Webster concedes that Webster 'has operated successfully as a junior college since 1947'."

This contention is erroneous in at least two respects.

First: Webster has consistently maintained throughout this proceeding that no institution can consider itself successful when it is stigmatized as inferior by lack of regional accreditation. Similarly, Webster has consistently contended that its operation cannot be considered successful when its graduates are unable to transfer their credits to senior institutions because of a lack of accreditation. Contrary to Middle States' assertion, there is nothing in the record to support the claim that Webster has conceded that is has operated successfully.

Second: Even if Webster had conceded that it has operated successfully (which it has not), this would not warrant denial of the petition. Ironically, Middle States seems to equate success with profitable operation. Webster concedes that it has realized a profit from its operations in the past. The fact that this has occurred does not, however, foreclose Webster from asserting its rights under the antitrust laws and the Constitution. Middle States seems to contend that bankruptcy is a condition precedent to assertion of these rights. This is patently erroneous. Under the antitrust laws, a plaintiff need merely demonstrate a dangerous probability of loss or damage to prevail--destruction of the plaintiff's enterprise is not required' *United States v. Borden Company*, 347 U.S. 514, 518 (1954). No citation is required to

demonstrate that a plaintiff need not show red ink on its income statement to assert a constitutional right.

In short, the issue is not whether Webster has successfully operated a junior college, but whether it has been injured by Middle States' activities. This injury is manifest when the junior college is stigmatized by lack of accreditation, when high school students are counselled to avoid unaccredited schools, when Webster's students experience great difficulty in transferring credits and are denied the benefits of the College Work-Study and National Defense Student Load programs.[1] Indeed, elements of this injury were recognized by the Court of Appeals.[2]

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[1] See Petition pp. 11-12. Middle States considers it significant that "Webster has not sought to participate in these programs . . ." (Opposition, p. 12). As Middle States knows, Webster has not sought participation in such programs because *it is ineligible to do so since it lacks Middle States' accreditation* (See Petition, p. 12, fn. 6-8). The argument is specious. Respondent's discussion of other aspects of federal program is also misleading. The reference to the Higher Education Amendments of 1968 (Opposition p. 12) and the quotation of the statute in respondent's Appendix (A-2) implies that Webster could obtain an acceptable alternative to accreditation via approval by an Advisory Committee established by the U.S. Commissioner of Education for schools as to which there is no accreditation available from a nationally recognized accrediting agency. The quoted portion of 20 U.S.C. 1085(b) omits clause (4) which limits the Advisory Committee procedure to "public or other non-profit institutions." It should also be noted that where proprietaries are eligible for benefits under the National Defense Education Act of 1958, as amended, 20 U.S.C. 403(b) (embracing definition of "proprietary institution of higher education" set forth in 20 U.S.C. 1088(b)), *such Advisory Committee procedure is specifically excluded.*

[2] "We recognize, as the trial court found, that lack of accreditation may be a not insignificant handicap to appellee both in the effect that such lack may have on students considering application for admission, and in the loss of the substantial benefits that the accreditation process itself has upon the institution under study." (App. A-10).

B. Antitrust

Middle States persists in its contention that its activities are exempt from the antitrust laws. In so doing, it has not even attempted to resolve the demonstrated confusion and inconsistency within the District of Columbia Circuit concerning the significance of an antitrust defendant's motives. (Petition, pp. 18-19). Similarly, Middle States seeks to distinguish the AMA case by urging that the AMA had predatory motives which contrast sharply with the alleged purity of Middle States' motives. This argument does not even come to grips with the *doctrine* of the AMA case, which is that the character of the defendant organization "... is of no significance, for Section 3 prohibits 'any person' from imposing the proscribed restraint." *American Medical Association v. United States*, 317 U.S. 519, 528-529 (1943).

This question of antitrust immunity for organizations such as Middle States should be resolved by this Court.

C. Reasonableness

Webster refrained from arguing the question of reasonableness in its petition, since it has not asserted the need for review of this substantive determination as an independent basis for certiorari. Middle States has argued the issue at length in its opposition (pp. 21-25). This factual issue seems irrelevant to consideration of the petition for certiorari.

D. The Common Law Issue

Webster has no occasion to reply to Middle States' argument concerning the common law issue (pp. 26-27), since the circuit court's decision on this issue was not raised in the petition as a reason for granting certiorari.

E. The Constitutional Issue

Middle States has chosen to ignore the two central constitutional issues which Webster raised in its petition: (1) whether a private association exercising governmental powers should be judged by a constitutional standard more lenient than that applicable to the government, and (2) whether Middle States' discrimination against proprietary institutions should be judged by the traditional equal protection test or the "compelling interest" test. These are important questions which warrant Middle States' comments. They have been ignored.

Instead, Middle States has merely asserted (1) that its activities do not involve state aciton, (2) that Webster did not raise the equal protection argument below, and (3) that since Webster operates a proprietary institution and seeks to "make money," its right to teach is not protected by the First Amendment. These diversions will be considered serially below:

(1) The Court of Appeals assumed without deciding that Middle States' functions constituted "state action." Compelling support for this assumption is found in the facts. The accrediting function is inherently governmental and is in fact practiced in varying degrees by the states of the United States and most foreign governments. Middle States has acted and continues to act as a "service agency" for federal and state governments to identify institutions eligible for government benefits. This function is recognized in statutes of the states and the United States, and is comparable to a delegation of power to an administrative agency. Middle States' accreditation process results in a large degree of control over curriculum, faculty and administration of federal and state institutions, including federal service academies. (Petition, pp. 12-15). See *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F. 2d 224 (5th Cir., 1968).

(2) Contrary to Middle States' assertion, Webster's equal protection argument was raised in both the district and circuit courts. Indeed, in Webster's brief to the Court of Appeals, an entire section of its argument was devoted to the proposition that its rights to due process and equal protection of the law had been violated.[3]

(3) The close of respondent's opposition borders on the ludicrous. It urges that the First Amendment "does not guarantee the right to make money" and that since Webster "makes money," it may not claim the protection of this most precious guarantee. Clearly, Webster does not assert a First Amendment right to make money. It asserts the right to operate a junior college without inhibition by unreasonable government action. This right to teach effectively is protected by the guarantee of free speech. (Petition, p. 25, fn. 26). Middle States suggests that an educational institution is entitled to First Amendment rights only if it is operated on a non-profit basis. Such an argument shows that Middle States is so obsessed with an aversion to proprietary enterprise in higher education that it denies such enterprise the most fundamental of our freedoms.

Respectfully submitted,

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November 2, 1970

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[3] Brief of appellee filed Nov. 21, 1969 in the U.S. Court of Appeals for the District of Columbia Circuit, pp. 56-59.